

A Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-31–10 OF 2019(Q), 02(f)-77–10 OF 2019(Q), 01(f)-32–10 OF 2019(Q), 01(i)-33–10 OF 2019(Q), 02(i)-79–10 OF 2019(Q) AND 02(f)-76–10 OF 2019(Q)
C ABANG ISKANDAR CJ (SABAH AND SARAWAK), VERNON ONG, ZABARIAH YUSOF, HASNAH HASHIM AND HARMINDAR SINGH FCJJ
24 NOVEMBER 2021

D *Native Law and Custom — Land dispute — Customary rights over land — ‘Pemakai Menoa’ and ‘Pulau Galau’ — Questions of law related to decisions of Federal Courts and Court of Appeal in Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (‘NCR’) land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281 (‘TR Sandah 1’), TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77 (‘TR Nyutan’), and Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256 (‘Nor ak Nyawai’) — Whether action ought to be initiated by way of a proper review application under r 137 of the Rules of the Federal Court 1995 — Whether there was necessity for Federal Court to revisit earlier decisions — Whether Federal Court ought to depart from earlier decisions in TR Sandah and TR Nyutan — Whether Court of Appeal was correct in following decisions in TR Sandah 1, TR Nyutan and Nor ak Nyawai — Whether ‘Pemakai Menoa’ and ‘Pulau Galau’ had the force of law under s 6A of the Sarawak Land Code — Rules of the Federal Court 1995 r 137 — Sarawak Land Code ss 5, 6A, 132 & 197*

H This judgment involved six appeals which were categorized into four cases namely case A, case B, case C and case D. The subject matter of dispute in the appeals were in relation to the native customary right (‘the NCR’) in Sarawak. The questions of law for the court’s determination were related to: (a) the decision of the Federal Court (‘the FC’) in the case of *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (‘NCR’) land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281 (‘TR Sandah 1’)*; (b) the decision of the FC in the case of *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals [2018] 1 MLJ 77 (‘TR Nyutan’)*; and (c) the decision of the Court of Appeal (‘the CA’) in the case of *Superintendent of Lands & Surveys, Bintulu v*

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Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256 ('Nor ak Nyawai') vis a vis the 2018 amendments to the Sarawak Land Code ('the SLC'). In Case A, the question raised was whether it was correct in law or proper for the CA to set aside the trial judge's finding of fact that the plaintiffs had acquired and/or created individual or communal NCR over State land in Sarawak on the application as a matter of law of the decision in *TR Sandah 1*. In Case B, the CA held that the appellants were only entitled to NCR over the 300 hectares of cultivation areas but not to the entire areas of *Pemakai Menoa* and *Pulau Galau* based on the decision of the FC in *TR Sandah 1*. The question posed in case B was whether the majority decision of the FC in *TR Sandah 1* with respect to customary practices of *Pemakai Menoa* and *Pulau Galau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau Galau* restored as customary practices having the force of law. As for case C, the issues were: (i) whether the CA's decision in *Nor ak Nyawai* that the rights of the native were confined to the area where they settled and not where they foraged for food was a correct statement of law; and (ii) whether the alleged practice of the Iban to preserve an area of jungle or forests as Pulau for access for food, wildlife and forest produce, gave rise to exclusive rights to the land in the Pulau. Lastly, in case D, the questions posed were: (A) whether the FC should depart from its earlier decision in *TR Sandah 1* on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TR Nyutan* on the indefeasibility of the lease of State land, and if so; (B) whether those cases had any significant bearing on the decision of the learned judicial commissioner in any event. The respondents submitted that the questions posed sought to review the substantive merits of the FC's decision in *TR Sandah 1*, which should be initiated by a proper review application under r 137 of the Rules of the Federal Court 1995 ('the RFC').

Held:

- (1) There was merit in the respondents' argument that the questions posed sought to review the substantive merits of the FC's decision in *TR Sandah 1*, which should be initiated by a proper review application under r 137 of the RFC. This was because, although the words used were review, overturn, restore and depart, these questions had the effect, in pith and substance, of questioning the correctness or otherwise of those very decisions in *TR Sandah 1*, *TR Nyutan* and *Nor ak Nyawai*. However, the present appeals were coming from the decisions of the CA, revolving around the issues of the application of *TR Sandah 1*, *TR Nyutan* and *Nor ak Nyawai* which directly related to the 2018 amendments of the SLC. For these reasons, it was improper for the court to simply dismiss the appeals on the basis of procedural impropriety (see paras 34–35 & 38–39).
- (2) The case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip Bhagwan') provided guidance as to what factors to consider when

- A dealing with the question of judicial precedent and its exceptions. The first factor where the FC may depart from earlier decision was the existence of conflicting decisions of the FCs over the same subject matter. The other factor was decision made per incurium — which correction of error was normally dependent on legislative process. In the present case,
- B both factors mentioned above were absent, as such, there was no necessity to revisit *TR Sandah 1* (see paras 57 & 61).
- (3) Applying the guidance in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, in particular the third reason on the aspect of interpreting the law, the court found that the ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* was based on an extensive assessment of the laws, both written and unwritten. The differences, if any, between the judges in *TR Sandah 1* were due to their individual interpretation and construction of the written laws vis a vis the unwritten law — the customary law. It was therefore not appropriate for this court to determine whether or not they interpreted or applied the law correctly, for that was a matter of opinion. Moreover, the ruling in *TR Sandah 1* had been addressed through legislative intervention by way of amendments made to the SLC in 2018. Such intervention was what the FC in *Dalip Bhagwan* case had referred to as ‘the correction of error was normally dependent on the legislative process’ (see paras 63–64).
- (4) The NCR of *Pemakai Menoa* and *Pulau Galau* were statutory communal rights governed independently under s 6A of the SLC where there would be issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein and would be treated as any title granted under the Land Code and the proprietary interest in that title would be indefeasible by virtue of s 132 of the SLC. Under s 6A of the NLC, for the purpose of inclusiveness, *Pemakai Menoa* and *Pulau Galau* were termed as native territorial domain. The NCR under ss 5 and 6A of the SLC were statutorily protected from alienation. They were to be excluded from provisional lease or a lease proper. Its extinguishment shall only be made according to the proper procedure in the SLC (see paras 71 & 171–172).
- (5) The 2018 amendments had the effect of statutorily overturning the ruling in *TR Sandah 1* in respect of *Pemakai Menoa* and *Pulau Galau* effectively on 1 August 2019. However, all final decisions following *TR Sandah 1* handed down before the said date were preserved. In the present appeals, when the High Court (‘the HC’) and the CA heard the cases, the legal position on *Pemakai Menoa* and *Pulau Galau* and the question of indefeasibility of title and extinguishment were still governed by the ruling in *TR Sandah 1* and *TR Nyutan* respectively. Therefore, there was no reason for the court to depart from those decisions, and hence, the

application of these decisions which were made prior to the date of in force of the 2018 amendments to the SLC, was correct and proper. Based on the above findings, the court answered the questions: (a) in Case A in the affirmative; (b) in case B in the negative; (c) in issue (i) of Case C in the affirmative; (d) in issue (ii) of Case C in the negative; (e) in issue (i) of Case D in the negative; and (f) in issue (ii) of Case D in the affirmative (see paras 79, 81–89 & 170).

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- (6) The Torrens System was the underlying premise or foundation of the SLC which placed importance on registration of title and the concept of indefeasibility. Any deprivation of an established right to land by virtue of indefeasibility shall warrant a claim against the State for compensation — such that the alienation and issue of lease without first ascertaining the existence of NCR of the claimants, damages by way of compensation under s 197 of the SLC would be the remedy, if indeed such rights existed in favour of the claimants (see para 173).

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- (7) In respect of Case A, considering the communal nature of *Pemakai Menoa* and *Pulau Galau* in s 6A of the SLC, an individual claim as opposed to communal claim could not be sustained. The court therefore dismissed the appeal in respect of case A. As for Case B, there was no assessment made by the CA on the finding of facts, such that the severance of 300 hectares of Temuda from the claimed 8,001 hectares was based on *TR Sandah 1*. As stated earlier, the CA was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*. However, with the coming into force of s 6A of the SLC, the court was of the view that this appeal ought to be sent back to the CA for a finding of fact specifically on the area where *Pemakai Menoa* and *Pulau Galau* were situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of *Pemakai Menoa* and *Pulau Galau* accordingly as allowed under s 6A of the SLC. Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the appellants who might had been deprived of their rights by reason of alienation of the lands to the third parties (see paras 161–163).

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- (8) In relation to Case C, which was disposed of summarily, a finding of fact as to whether there was NCR in the form of *Pemakai Menoa* and *Pulau Galau* over the land must be based on a full trial of the matter as against the third party because if it was proved that their NCR existed as a matter of established fact, the appellants would be entitled for compensation under s 197 of the SLC. Therefore, the summary disposal of the appellants' claim against the third party was improper merely based on the affidavit evidence. Evidence needed to be led viva voce subject to due cross-examination by adverse parties. For this reason, this case was reverted to the HC to be fully heard as between the appellants and the third party specifically on the question of whether there was NCR created

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A or existed on the alienated land which entitled the appellants for compensation (see paras 167–168).

(9) In respect of case D, upon perusal of both the judgments of the HC and the CA, the court was satisfied that based on the proper appreciation of the evidence presented, the concurrent findings had been that there was no NCR created nor existed over the land concerned. The court found no reason to disturb such findings by both the courts below, as such, the court affirmed the decisions of the HC and the CA and dismissed the appeal (see para 169).

C **[Bahasa Malaysia summary]**

Penghakiman ini melibatkan enam rayuan yang dikategorikan kepada empat kes iaitu Kes A, Kes B, Kes C dan Kes D. Perkara yang menjadi pertikaian dalam rayuan-rayuan ini adalah berhubung dengan hak adat orang asal ('NCR') di Sarawak. Persoalan-persoalan undang-undang untuk penentuan mahkamah adalah berkaitan dengan: (a) keputusan Mahkamah Persekutuan ('MP') dalam kes *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors* (*suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit*) and other appeals [2017] 2 MLJ 281 ('TR Sandah 1'); (b) keputusan MP dalam kes *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 ('TR Nyutan'); dan (c) keputusan Mahkamah Rayuan ('MR') dalam kes *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256 ('Nor ak Nyawai') berkenaan dengan pindaan 2018 kepada Kanun Tanah Sarawak ('KTS'). Dalam Kes A, persoalan yang dibangkitkan ialah sama ada betul atau wajar bagi MR mengeneipkan dapatan hakim bicara tentang fakta bahawa plaintif telah memperoleh dan/atau mewujudkan NCR individu atau komunal ke atas tanah Negeri di Sarawak berdasarkan pemakaian undang-undang keputusan dalam *TR Sandah 1*. Dalam Kes B, MR berpendapat bahawa perayu-perayu hanya berhak mendapat NCR ke atas 300 hektar kawasan penanaman tetapi tidak bagi keseluruhan kawasan Pemakai Menoa dan Pulau Galau berdasarkan keputusan MP dalam *TR Sandah 1*. Persoalan yang dikemukakan dalam Kes B ialah sama ada keputusan majoriti MP dalam *TR Sandah 1* berkenaan dengan amalan adat Pemakai Menoa dan Pulau Galau perlu disemak semula, dan dibatalkan, dan Pemakai Menoa dan Pulau Galau dikembalikan sebagai amalan adat yang mempunyai kuasa undang-undang. Bagi Kes C, isu-isunya ialah: (i) sama ada keputusan MR di dalam kes *Nor ak Nyawai* bahawa hak orang asal terhadap kepada kawasan tempat mereka menetap dan bukannya tempat mereka mencari makanan adalah pernyataan undang-undang yang betul; dan (ii) sama ada amalan orang Iban yang dikatakan memelihara kawasan hutan sebagai Pulau untuk mendapatkan makanan, hidupan liar dan hasil hutan, menimbulkan hak eksklusif ke atas tanah di Pulau tersebut. Akhir sekali, dalam

Kes D, persoalan-persoalan yang dikemukakan ialah: (A) sama ada MP harus beralih arah daripada keputusannya yang awal dalam *TR Sandah 1* mengenai persoalan Pemakai Menoa dan Pulau Galau tidak mempunyai kuasa undang-undang dan *TR Nyutan* berkenaan hak yang tidak boleh disangkal ke atas pajakan tanah Negeri dan jika betul; (B) sama ada kes tersebut mempunyai apa-apa kesan penting ke atas keputusan pesuruhjaya kehakiman yang bijaksana dalam apa jua keadaan. Responden-responden berhujah bahawa persoalan-persoalan yang dikemukakan bertujuan untuk menyemak semula merit substantif keputusan MP dalam *TR Sandah 1*, yang sepatutnya dimulakan melalui permohonan semakan yang betul di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KKMP').

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Diputuskan:

- (1) Terdapat merit dalam hujah responden-responden bahawa persoalan-persoalan yang dikemukakan bertujuan untuk menyemak semula merit substantif keputusan MP dalam *TR Sandah 1*, yang sepatutnya dimulakan melalui permohonan semakan yang betul di bawah k 137 KKMP. Ini adalah kerana, walaupun perkataan yang digunakan ialah menyemak semula, menterbalikkan, memulihkan dan beralih arah, persoalan-persoalan ini mempunyai kesan, dalam 'pith and substance', mempersoalkan ketepatan atau sebaliknya keputusan-keputusan dalam *TR Sandah 1*, *TR Nyutan* dan *Nor ak Nyawai*. Walau bagaimanapun, rayuan-rayuan semasa adalah berpunca daripada keputusan MR, berkisar tentang isu pemakaian *TR Sandah 1*, *TR Nyutan* dan *Nor ak Nyawai* yang berkaitan secara langsung dengan pindaan 2018 KTS. Atas sebab-sebab ini, adalah tidak wajar untuk mahkamah menolak rayuan-rayuan tersebut berdasarkan ketidakwajaran prosedur (lihat perenggan 34–35 & 38–39).
- (2) Kes *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip Bhagwan') memberikan panduan tentang faktor-faktor yang perlu dipertimbangkan semasa menangani persoalan berkenaan preseden kehakiman dan pengecualiannya. Faktor pertama yang membolehkan MP untuk membuat keputusan yang berbeza daripada keputusannya yang awal ialah wujudnya keputusan MP yang bercanggah mengenai perkara yang sama. Faktor lain ialah keputusan yang dibuat adalah per incurium — di mana pembetulan kesilapan biasanya bergantung pada proses perundangan. Dalam kes ini, kedua-dua faktor yang dinyatakan di atas tidak dibuktikan, oleh itu, tidak ada keperluan untuk menyemak semula *TR Sandah 1* (lihat perenggan 57 & 61).
- (3) Mengguna pakai panduan dalam *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, khususnya alasan ketiga dalam aspek pentafsiran undang-undang, mahkamah mendapati bahawa keputusan berkaitan Pemakai Menoa dan Pulau Galau dalam *TR Sandah 1* adalah

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- A berdasarkan penilaian yang meluas terhadap undang-undang, sama ada bertulis dan tidak bertulis. Perbezaan, jika ada, antara hakim-hakim dalam *TR Sandah 1* adalah disebabkan oleh interpretasi dan tafsiran individu terhadap undang-undang bertulis berhubung dengan undang-undang tidak bertulis — undang-undang adat. Oleh itu adalah tidak wajar mahkamah ini menentukan sama ada mereka mentafsir atau menggunakan undang-undang dengan betul atau tidak, kerana itu adalah soal pendapat. Selain itu, keputusan dalam *TR Sandah 1* telah ditangani melalui campur tangan perundangan melalui pindaan yang dibuat kepada KTS pada tahun 2018. Campur tangan sedemikian adalah apa yang MP dalam kes *Dalip Bhagwan* rujuk sebagai ‘the correction of error was normally dependent on the legislative process’ (lihat perenggan 63–64).
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- (4) Hak adat orang asal Pemakai Menoa dan Pulau Galau adalah hak komunal berkanun yang ditadbir secara berkecuali di bawah s 6A KTS di mana akan ada pengeluaran hak milik komunal asal untuk tempoh selama-lamanya, tanpa apa-apa premium, sewa atau caj lain, atas nama seseorang atau kumpulan orang yang diberi amanah untuk komuniti orang asal yang dinamakan di dalamnya dan akan dianggap seperti mana-mana hakmilik lain yang diberikan di bawah Kanun Tanah dan kepentingan proprietari dalam hak milik tersebut tidak boleh disangkal menurut s 132 KTS. Di bawah s 6A KTS, untuk tujuan keterangkuman, Pemakai Menoa dan Pulau Galau diistilahkan sebagai ‘native territorial domain’. Hak adat orang asal di bawah ss 5 dan 6A KTS adalah dilindungi undang-undang daripada pengasingan. Ianya dikecualikan daripada pajakan sementara atau pajakan penuh. Pembatalannya hendaklah hanya dibuat mengikut prosedur yang betul dalam KTS (lihat perenggan 71 & 171–172).
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- (5) Pindaan 2018 mempunyai kesan membatalkan secara berkanun keputusan dalam *TR Sandah 1* berkenaan dengan Pemakai Menoa dan Pulau Galau berkuat kuasa pada 1 Ogos 2019. Walau bagaimanapun, semua keputusan akhir yang mengikut *TR Sandah 1* yang dibuat sebelum tarikh tersebut adalah dikekalkan. Dalam rayuan semasa, apabila Mahkamah Tinggi (‘MT’) dan MR mendengar kes-kes tersebut, kedudukan undang-undang berkenaan Pemakai Menoa dan Pulau Galau dan persoalan hak yang tidak boleh disangkal ke atas hak milik dan pembatalan hak tersebut masih tertakluk kepada keputusan-keputusan dalam *TR Sandah 1* dan *TR Nyutan*. Oleh yang demikian, tiada sebab untuk mahkamah beralih arah daripada keputusan tersebut, dan oleh itu, pemakaian keputusan yang dibuat sebelum tarikh pindaan 2018 berkuat kuasa kepada KTS, adalah betul dan wajar. Berdasarkan dapatan-dapatan di atas, mahkamah menjawab persoalan-persoalan: (a) dalam Kes A secara afirmatif; (b) dalam Kes B secara negatif; (c) dalam isu (i) Kes C secara afirmatif; (d) dalam isu (ii) Kes C secara negatif; (e) dalam isu (i) Kes D
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- secara negatif; dan (f) dalam isu (ii) Kes D secara afirmatif (lihat perenggan 79, 81–89 & 170). A
- (6) Sistem Torrens adalah premis atau asas kepada KTS yang meletakkan kepentingan pada pendaftaran hak milik dan konsep ketidakbolehsangkalan. Apa-apa pelucutan hak yang telah ditetapkan ke atas tanah disebabkan oleh ketidakbolehsangkalan akan menjamin tuntutan terhadap pihak berkuasa Negeri untuk pampasan — supaya ganti rugi melalui pampasan di bawah s 197 KTS akan menjadi remedi kepada pengasingan dan pengeluaran pajakan tanpa terlebih dahulu memastikan kewujudan NCR pihak-pihak yang menuntut, sekiranya betul bahawa hak pihak yang menuntut yang tersebut adalah wujud (lihat perenggan 173). B C
- (7) Berkenaan dengan Kes A, memandangkan sifat komunal Pemakai Menoa dan Pulau Galau dalam s 6A KTS, tuntutan individu yang bertentangan dengan tuntutan komunal tidak dapat dikekalkan. Oleh itu mahkamah menolak rayuan yang berkaitan dengan Kes A. Bagi Kes B, tiada penilaian dibuat oleh MR ke atas dapatan fakta, bahawa pengecualian 300 hektar Temuda daripada 8,001 hektar tanah yang dituntut adalah berdasarkan *TR Sandah 1*. Seperti yang dinyatakan sebelum ini, MR adalah tepat untuk membuat perintah sedemikian berdasarkan ketetapan semasa *TR Sandah 1*. Walau bagaimanapun, dengan berkuatkuasanya s 6A KTS, mahkamah berpendapat rayuan ini hendaklah dikembalikan semula kepada MR untuk membuat dapatan fakta khususnya berkenaan kawasan di mana Pemakai Menoa dan Pulau Galau terletak dalam 8,001 hektar tanah tersebut dengan mengambil kira maksimum 500 hektar atau 1,000 hektar Pemakai Menoa dan Pulau Galau yang sewajarnya seperti yang dibenarkan di bawah s 6A KTS. Apa-apa dapatan sedemikian adalah relevan untuk tujuan pampasan di bawah s 197 KTS kepada perayu-perayu yang mungkin telah dilucutkan hak mereka disebabkan oleh pengasingan tanah kepada pihak ketiga (lihat perenggan 161–163). D E F G
- (8) Berhubung dengan Kes C, yang telah dilupakan secara ringkas, dapatan fakta sama ada terdapat NCR dalam bentuk Pemakai Menoa dan Pulau Galau ke atas tanah tersebut mestilah berdasarkan perbicaraan penuh ke atas perkara tersebut terhadap pihak ketiga kerana jika dibuktikan bahawa NCR mereka wujud sebagai fakta yang telah ditetapkan, perayu-perayu akan layak mendapat pampasan di bawah s 197 KTS. Oleh itu, pelupusan secara ringkas tuntutan perayu terhadap pihak ketiga yang dibuat hanya dengan berdasarkan keterangan afidavit adalah tidak wajar. Keterangan perlu dikemukakan secara viva voce tertakluk kepada pemeriksaan balas yang sewajarnya oleh pihak lawan. Atas sebab ini, kes ini dikembalikan kepada MT untuk dibicarakan sepenuhnya di antara perayu dan pihak ketiga khususnya mengenai persoalan sama ada H I

- A terdapat NCR yang diperoleh atau wujud di atas tanah yang diasingkan tersebut yang memberi hak kepada perayu-perayu untuk pampasan (lihat perenggan 167–168).
- B (9) Berkenaan dengan Kes D, setelah meneliti kedua-dua penghakiman MT dan MR, mahkamah berpuas hati bahawa berdasarkan penghayatan sewajarnya terhadap keterangan yang dikemukakan, dapatan-dapatan yang serupa yang dibuat adalah bahawa tiada NCR yang diperoleh atau wujud di atas tanah tersebut. Mahkamah mendapati tiada sebab untuk mengganggu dapatan-dapatan sedemikian oleh kedua-dua mahkamah di bawah, oleh itu, mahkamah mengesahkan keputusan MT dan MR dan menolak rayuan (lihat perenggan 169).]
- C

Cases referred to

- D *Alma Nudo Atenza v PP and another appeal* [2019] 4 MLJ 1, FC (refd)
Arulpragasam all Sandaraju v PP [1997] 1 MLJ 1, FC (refd)
Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1, FC (refd)
Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] AC 436, HL (refd)
- E *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169, PC (refd)
Bowtell v Goldsbrough, Mort and Company Ltd (1905) 3 CLR 444; (1905) 12 ALR 82; (1905) 23 WN (NSW) 40i; [1905] HCA 60, HC (refd)
Cadder v Her Majesty's Advocate (2010) 30 BHRC 257, SC (refd)
- F *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (folld)
Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2022] 1 MLJ 1; [2021] 6 CLJ 1, FC (refd)
- G *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (refd)
- H *Golden Star & Ors v Ling Peek Hoe & Ors* [2021] 2 MLJ 259; [2021] 3 CLJ 443, FC (refd)
Government of the Federation of Malaya v Surinder Singh Kanda [1961] 1 MLJ 121, CA (refd)
Heydon's Case (1584) 76 ER 637 (refd)
- I *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766, FC (refd)
Indira Nehru Gandhi v Shri Raj Narain 1975 2 SCC 159, SC (refd)
Inland Revenue Commissioners v Hinchy [1960] 1 All ER 505, HL (refd)

- Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311, FC (refd) A
- Jeli Anak Naga and Binglai Anak Buassan & 9 Ors v Entrep Resources Sdn Bhd & 3 Ors* (unreported), FC (refd)
- Jeli Anak Naga & 4 Others v Tung Huat Pelita Niah Plantation & Ors and Another Appeal* [2019] MLJU 1311, FC (refd) B
- Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265, SC (refd)
- Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095, HL (refd)
- Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, FC (refd) C
- Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385, FC (refd)
- Mabo and others v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1, HC (refd)
- Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309, FC (refd) D
- Maxwell v Murphy* (1957) 96 CLR 261, HC (refd)
- Medical Council of India v The State of Kerala Writ Petition (C) No 178 & 231 of 2018* (unreported), SC (refd)
- Muhammed bin Hassan v PP* [1998] 2 MLJ 273, FC (refd) E
- Munusamy v PP* [1987] 1 MLJ 492, SC (refd)
- Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383, HC (refd)
- PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd) F
- PP v Dato' Yap Peng* [1987] 2 MLJ 311, SC (refd)
- PP v Richard Kwan* [1970] 2 MLJ 286 (refd)
- PP v Tan Tatt Ek & other appeals* [2005] 2 MLJ 685, FC (refd)
- R v Zeolkowski* [1989] 1 SCR 1378, SC (refd)
- Ramanathan Yogendran v PP* [1995] 2 SLR 563, HC (refd) G
- ST Sadiq v State of Kerala* [2015] 4 SCO 400, SC (refd)
- Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, FC (refd)
- Smith v London Transport Executive* [1951] AC 555; [1951] 1 All ER 667, HL (refd)
- Spectrum Plus Ltd, Re; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] UKHL 41, HL (refd) H
- Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
- TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77, FC (refd) I
- TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other*

- A *appeals* [2019] 6 MLJ 141, FC (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (folld)
Warburton v Loveland d Ivie (1828) 1 Hud & B 623 (refd)
Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other
 B *appeals* [2021] 1 MLJ 478; [2021] 1 CLJ 631, FC (refd)

Legislation referred to

- Administration of Islamic Law (Federal Territories) Act 1993 s 59(1)
 Criminal Procedure Code
 C Federal Constitution arts 140(1), 144(1), 160(2), 162, Second Schedule,
 Part II, s 1, Part III
 Fruit Trees Order 1899
 Land Order 1920
 D Land Settlement Ordinance 1933
 Rajah's Order 1875
 Rules of Court 2012 O 14A, O 18 r 19
 Rules of the Federal Court 1995 r 137
 Land Code (Cap 81) ss 2, 4, 4(4), 5, 5(2)(f), 5(3), (7), 6, 6A, 6A(6),
 E 10, 13, 13(1), 15, 15(1), 18, 18A, 28, 29(1), 82, 88, 130(2), 132,
 132(1), 197

Appeal from: Civil Appeal Nos Q-01-79-03 of 2104, Q-02-524-03 of 2104,
 Q-01-418-10 of 2104, Q-01(IM)(NCvC)-476-12 of 2017,
 F Q-02(IM)(NCVC)-2507-12 of 2017 and Q-02(IM)(NCVC)-537-03 of
 2018 (Court of Appeal, Putrajaya)

- Mekanda Singh Sandhu (M Izayyeem Azim and Paui Raja with him) (Sagau,
 Raja & Co) in Civil Appeal Nos 01(f)-31-10 of 2019(Q) and 02(f)-77-10 of
 2019(Q) for the appellant.*
 G *Dominique Ng Kim Ho (Berrylin Ng Phuay Lee with him) (Dominique Ng &
 Assoc) in Civil Appeal Nos 01(f)-32-10 of 2019(Q) and 02(f)-76-10 of
 2019(Q) for the appellant.*
*Simon Siah (Clarice Chan and Joshua Baru with him) (Simon Siah Chua and
 Chow Advocates) in Civil Appeal Nos 01(i)-33-10 of 2019(Q) and
 H 02(i)-79-10 of 2019(Q) for the appellant.*
*Mohd Adzrul Adzlan (Anisa Fadhiilah bt Mohamed Jamei with him) (Sarawak
 State Attorney General's Chambers) in Civil Appeal No 01(f)-31-10 of
 2019(Q) for the respondent.*
 I *Danny Huang Dung Po (Huang & Co Advocates) in Civil Appeal No
 02(f)-77-10 of 2019(Q) for the respondent.*
*Mohd Adzrul Adzlan (Ronald Feiix Hardin with him) (Sarawak State Attorney
 General's Chambers) in Civil Appeal Nos 01(f)-32-10 of 2019(Q) and
 01(i)-33-10 of 2019(Q) for the respondent.*
Gabriel CH Kok (Amanda Yong with him) (Khoo & Co Advocates) in Civil Appeal

No 02(i)-79–10 of 2019(Q) for the respondent.
Tony Lim Lee Tom (Nathan Ting) (Satem, Chai & Dominic Lai Advocates) in
Civil Appeal No 02(f)-76–10 of 2019(Q) for the respondent.

A

Abang Iskandar CJ (Sabah and Sarawak):

B

INTRODUCTION

[1] There are six appeals that were heard together despite there being different parties involved, except in two cases — Case A and Case C (which will be enumerated later) where the parties are the same. We heard oral submissions by all learned counsel representing the respective parties on two separate dates. At the end of those submissions, we stood down for the panel members to deliberate. Unfortunately, we were not able to come up with a decision on that day. We therefore indicated to all learned counsel that we needed a bit of time to consider the respective submissions and that they would be informed once a decision is reached pertaining to each of these appeals, in due course. We have now reached our decisions and what follow below are our deliberations of the issues raised and our reasons as to why we have so decided.

C

D

[2] My learned brothers Justices Vernon Ong Lam Kiat and Harmindar Singh Dhaliwal and my learned sisters Justice Zabariah Mohd Yusof and Justice Hasnah Mohammed Hashim had read this judgment in draft and they had indicated to me their agreement with it and that it becomes the judgment of this court.

E

F

[3] Although there have been not a few issues raised in the questions that were posed before this court for our considerations, we observed that there were some common issues that transcended most of the appeals. The main commonality in these cases has been the very subject matter of dispute — the native customary right ('NCR') in Sarawak; and the questions of law for this court's determination — on matters relating to the Federal Court decisions in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors* (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1 ('TR Sandah 1'); *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors* and other appeals [2018] 1 MLJ 77 ('TR Nyutan'); and the Court of Appeal decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors* and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555 ('Nor ak Nyawai') vis a vis the 2018 Amendments to the Sarawak Land Code ('the SLC').

G

H

I

[4] For clarity and better understanding of the issues in question, it is

- A pertinent for us to provide a brief history of the facts of each case which finally culminated in the framing of the questions for the court's determination.

BRIEF BACKGROUND OF THE CASES

Case A

B	Case No	Appellant	Respondent
C	01(f)-31-10 of 2019 (Q)	1. Busing ak Jalil 2. Lai ak Jali 3. Nanggai ak Liyom 4. Burai ak Enseriban 5. Bunyie ak Guha 6. Bunta ak Mamut 7. Marsar ak Aping	1. Kerajaan Negeri Sarawak 2. Jabatan Tanah dan Survei Cawangan Mukah
D	02(f)-77-10 of 2019 (Q)	1. Busing ak Jalil 2. Lai ak Jali 3. Nanggai ak Liyom 4. Burai ak Enseriban 5. Bunyie ak Guha 6. Bunta ak Mamut 7. Marsar ak Aping	Empire Plantation Sdn Bhd
E			

- F [5] The question of law for this court's determination is framed in the following manner:

G *Whether it is correct in law or proper for the Court of Appeal to set aside the trial judge's finding of fact that the plaintiffs have acquired and/or created individual or communal native customary rights over State land in Sarawak on the application as a matter of law of the decision in Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1.

H [6] In this case, the High Court judge had, on 3 February 2014, decided upon a full trial that the appellants had acquired and/or created individual or communal NCR over 1,391.42 acres of land within the 4,460 hectares more or less of the provisional lease Lot 11 granted to Empire Plantation Sdn Bhd. In
I his judgment, the judge was satisfied, on the balance of probabilities that the appellants had proved the NCR of *Pemakai Menoa* and *Pulau Galau* over the said land. The aggrieved defendants appealed against that decision.

[7] On appeal, the Court of Appeal reversed the decision of the High Court

judge and ruled that based on the decision of *TR Sandah 1*, the customary practices of *Pemakai Menoa* and *Pulau Galau* were not customs or usages having the force of law in the Sarawak State Laws as defined in art 160(2) of the Federal Constitution.

[8] The Court of Appeal further stated that the customary practices of *Pemakai Menoa* and *Pulau Galau* must be for the whole community, and since the claim was not a representative action but was only for the seven appellants, it must necessarily fail. It was this aspect of the Court of Appeal's decision that the appellants sought this court's consideration to answer additional question as to 'whether the claim for NCR based on *Pemakai Menoa* and *Pulau Galau* must be for the whole community and not for the appellants only' (the Court of Appeal's decision was made on 13 July 2017).

[9] Clearly, the question for this court's determination concerns the correctness of the Court of Appeal's application of the majority ruling in *TR Sandah 1* in respect of the customary practices of *Pemakai Menoa* and *Pulau Galau* to the finding of facts and the decision of the High Court judge.

Case B

Case No	Appellant	Respondent
01(f)-32-10 of 2019 (Q)	1. Nikodemus ak Singgai	1. Superintendent of Lands and Surveys Samarahan Division
	2. Gubil ak Padat	2. Director of Forest, Sarawak
	3. Sangat ak Lasa (a representative action)	3. Kerajaan Negeri Sarawak

[10] The question of law for the court's determination is as follows:

Whilst the customary practices of *Pemakai Menoa* and *Pulau* do not appear in any codified law under the Rajahs, their existence had been acknowledged in the Reports and historical texts, whereas it is axiomatic that customary rights do not owe their existence to statute; instead, they are recognised as a source of unwritten laws, and as such, *whether the majority decision of Federal Court in Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 with respect to customary practices of *Pemakai Menoa* and *Pulau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau* restored as customary practices having the force of law.

[11] This case is a representative action brought on behalf of the claimants and all others who claimed native customary rights over land at or around

A Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Ili at Gedong in the district of Simunjan, Sarawak.

B [12] In this case, there were initially six respondents including the three above, namely Sibu Slipway Sdn Bhd, the holder of Forest Licence No 8393; Lambang Sinar Mas Sdn Bhd, the holder of two leases described as Lot 226 Block 4 Sedilu-Gedong Land District and Lot 1 Block 9 Sedilu-Gedong Land District; and Indranika Jaya Sdn Bhd, the holder of a lease described as Lots 164, 162 and 173 of Sedilu-Gedong Land District.

C [13] However, these three parties were removed from the suit by virtue of their successful striking out applications primarily due to their holding of the indefeasibility of title of the license and the lease as demonstrated in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] MLJU 2212; [2010] 10 CLJ 383 ('Nikodemus 1'). Hence, the full trial of the matter proceeded only against the Superintendent of Lands and Surveys Samarahan Division, Director of Forest, Sarawak and Kerajaan Negeri Sarawak.

E [14] At the High Court, the judge found on 11 August 2014, on the strength of the evidence presented after a full trial, that the appellants had successfully proved, on the balance of probabilities, that they had acquired, created and/or inherited NCR prior to the 1 January 1958 over the disputed areas of 8,001 hectares over which the forest timber license and leases were issued. Of the 8,001 hectares, were cultivation mosaics measuring approximately 300 hectares.

G [15] However, in view of the earlier judgment in *Nikodemus 1* on indefeasibility of titles, the judge varied the earlier order and decided that an award of general damages to be assessed by the SAR against the respondents for loss of the appellants' native customary rights over the entire disputed areas which have been alienated to the named licensee and lessees above. This variation order was made on 10 September 2014.

H [16] On appeal, the Court of Appeal decided on 13 July 2017 that the appellants are only entitled to the NCR over the 300 hectares of cultivation mosaics — the agreed *temuda*, but not to the entire areas of *Pemakai Menoa* and *Pulau Galau*, based on the decision of the Federal Court in *TR Sandah 1*.
Case C

I	Case No	Appellant	Respondent
	01(i)-33-10 of 2019 (Q)	1. Ramba ak Bungkong	1. Unus bin Tambi

	2. Mujing ak Louis	2. Superintendent of Lands and Surveys, Miri Division	A
	3. Johnny ak Louis Nanta	3. State Government of Sarawak	B
	4. Jarin ak Leng		
	5. Aning ak Simon		
02(i)-79-10 of 2019 (Q)	6. Dickson ak Jalang		
	1. Ramba ak Bungkong	Asco Green Sdn Bhd	C
	2. Mujing ak Louis		
	3. Johnny ak Louis Nanta		D
	4. Jarin ak Leng		
	5. Aning ak Simon		
	6. Dickson ak Jalang		

[17] At the High Court, Asco Green Sdn Bhd was the plaintiff, and the appellants were the defendants while Unus bin Tambi, Superintendent of Lands and Surveys, Miri Division and State Government of Sarawak were made third parties. Asco Green sued the appellants for a right to vacant possession; order of eviction; and declarations that the appellants were trespassers and illegal occupiers on the land it held on a lease.

[18] Asco Green then sought for a summary judgement under O 14A of the Rules of Court 2012 ('the ROC') as well as for striking out the appellants defence and counterclaim under O 18 r 19 of the ROC. The third parties similarly filed for striking out of the appellants' statement of claim against them. These applications were allowed on 3 November 2017, hence the appellants' defence and counterclaim against Asco Green Sdn Bhd and their statement of claim against the third party were struck out.

[19] Judgment was also entered against the appellants under O 14A of the ROC based on the following main reasons:

- (a) that Asco Green Sdn Bhd, as the registered proprietor of an area approximately 707 hectares described as Lot 130 Block 3 Bakong Land District for the lease of the said land holds an indefeasible title;
- (b) based on the affidavit evidence, the disputed area of Lot 130 was a primary forest in 1947 and 1963 with no proof of cultivation or settlement; and

- A (c) the claim of NCR over the area for foraging food, deriving valuable medicines, wildlife and other forest produce for livelihood and sustenance in the context of *Pemakai Menoa* and *Pulau Galau* are not maintainable because they are customs that have no force of law as ruled by the Federal Court in *TR Sandah 1*.
- B
- [20] The Court of Appeal upheld the decision of the High Court on 20 February 2019 and ruled that the disposal of the matter summarily under O 14A; and O 18 r 19 of the ROC against the appellants was proper on the facts and circumstances of the case.
- C
- [21] The question of indefeasibility of title held by Agro Green was a non-issue, on top of the absence of any allegation of fraud in the pleading either against Agro Green or the third parties. Hence the absence of any vitiating factor defeating Agro Green's right as the registered proprietor of Lot 130.
- D
- [22] The Court of Appeal also held that the legal status of *Pemakai Menoa* and *Pulau Galau* have been firmly established by the Federal Court in *TR Sandah 1* as having no force of law, that they cannot be grounds for claims of NCR. As a corollary, the question of extinguishment of NCR land did not arise.
- E
- [23] Following the decision of the Court of Appeal, four questions of law were framed by the appellants for this court's determination, as follows:
- F
- (i) whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives are confined to the area where they settled and not where they foraged for food is a correct statement of law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak;
- G
- (ii) whether the alleged practice of the Iban to preserve an area of jungle or forests as 'Pulau' for access for food, wild life and forest produce, gives rise to exclusive rights to the land in the 'Pulau';
- H
- (iii) whether an *extinguishment* exercise of native customary rights over land as provided under s 15 of the Sarawak Land Code (Cap 81) is required prior to the alienation of lease of state land; and
- I
- (iv) if the answer to (iii) is in the positive, whether the lease of state land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native

customary rights to be excised out or excluded from the lease of state land.

Case D

Case No	Appellant	Respondent
02(f)-76-10 of 2019	1. Yahya bin Timbon 2. Mahari bin Lamat 3. Haslan bin Abu Bakar	Kumpulan Parabena Sdn Bhd

[24] At the High Court, the respondent initially filed separate originating summonses ('OS') against each appellant for, inter alia, vacant possession and quiet enjoyment of the lands described as Lots 187 and Lot 188 of Block 10 Lambir Land District which are held on lease for a term of 60 years from 1 September 2009. The said OS were converted to writ actions and jointly tried.

[25] Upon evaluating the evidence, the High Court judge had, on 17 January 2018, allowed the respondent's claim and dismissed the appellants' counterclaim of NCR over the disputed areas, primarily due to the unsatisfactory and to a certain extent, contradictory evidence.

[26] It was held that in light of the Federal Court's decision in *TR Sandah 1*, NCR claim does not extend to areas where the natives used to roam to forage for their livelihood. Moreover, there was no evidence of the said lands being cleared or cultivated before 1 January 1958 for the said lands was a virgin forest in 1951 and remained the same in 1961.

[27] The High Court judge also found that the respondent, as the registered proprietor held indefeasible title over the disputed lands which title was not shown on evidence to have been issued fraudulently or without complying to due processes.

[28] On appeal, the Court of Appeal unanimously confirmed the findings and the decision of the High Court judge on 8 January 2019 mainly based on the application of the Federal Court's decision in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau*; and *TR Nyutan* on indefeasibility of title. The Court of Appeal further noted that amendments to the Land Code in ss 6A and 28 have no bearing on the case as the amendments took effect only on 1 August 2019.

[29] Stemming from the Court of Appeal decision, the following question of law was framed for the Federal Court's determination:

Whether the Federal Court should depart from the decision of the Federal Court in Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of

- A themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1 on the question of *Pemakai Menoa and Pulau Galau* having no force of law and that of *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018]
- B 1 MLJ 77 on the indefeasibility of the Lease of State Land and if so, whether those cases have any significant bearing on the decision of the Learned Judicial Commissioner in any event?

THE COMMONALITY OF THE QUESTIONS OF LAW

- C [30] Upon analysing the various questions framed for this court's determination, we identified the commonalities of those questions which we would categorise into three main issues and subissues as follows:
- D (a) reviewing or revisiting earlier decision/s of the Federal Court in *TR Sandah 1* (Case B, D) and *TR Nyutan* (Case D) and of the Court of Appeal in *Nor ak Nyawai* (Case C):
- E (i) the correctness of applying *TR Sandah 1* to the trial judge's finding of facts on NCR (Case A); and
- (ii) Communal versus individual NCR (added question in Case A).
- (b) *TR Nyutan* — on indefeasibility of title and extinguishment of NCR (Case C, D); and
- F (c) the effects of the 2018 Amendments to the Sarawak Land Code.

REVIEWING OR REVISITING EARLIER DECISIONS

- G [31] There are two modes where this court may assess and examine earlier decisions — through a proper review application under r 137 of the Rules of the Federal Court 1995, or by way of an appeal proper.

- H [32] The application of r 137 has been succinctly explained by this Court in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] MLJU 1090; [2008] 6 CLJ 1 ('Asean Security') that was followed subsequently by this court in a number of recent cases such as *Golden Star & Ors v Ling Peek Hoe & Ors* [2021] 2 MLJ 259; [2021] 3 CLJ 443; *Yong Tshu Khin & Anor v Dahan Cipta Sdn Bhd & Anor and other appeals* [2021] 1 MLJ 478; [2021] 1 CLJ 631; *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1; [2021] 6 CLJ 1, to name a few. In gist, there must be very exceptional circumstance for a review to take place. But we are not concerned with this type of application in this case.

- [33] In the present case, three earlier decisions are sought to be revisited —

two are the Federal Court's decisions — *TR Sandah 1* and *TR Nyutan*; and one Court of Appeal decision — *Nor ak Nyawai*. At the risk of repetition, we find the need to reproduce the three related questions posed to us which are framed in the following manner:

... whether the majority decision of Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 with respect to customary practices of *Pemakai Menoa* and *Pulau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau* restored as customary practices having the force of law. (Case B)

Whether the Court of Appeal's decision in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives are confined to the area where they settled and not where they foraged for food is a correct statement of law. (Case C)

Whether the Federal Court should depart from the decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 on the indefeasibility of the lease of State Land and if so, whether those cases have any significant bearing on the decision of the Learned Judicial Commissioner in any event. (Case D)

[34] It was on the basis of the manner as to how the questions of law framed for this court's determination, that the respondents urged this court to dismiss the appeals, because these questions sought to review the substantive merits of the Federal Court decision in *TR Sandah 1*, which should be initiated by a proper review application under r 137 of the Rules of the Federal Court 1995.

[35] In all fairness, there is merit in this argument by the respondents, in that although the words used are review, overturn, restore and depart, these questions have the effect, in pith and substance, of questioning the correctness or otherwise of those very decisions in *TR Sandah 1*, *TR Nyutan* and *Nor ak Nyawai*.

[36] In fact, we found that the question framed in this case in respect of the correctness of the Court of Appeal's statement in *Nor ak Nyawai* to be exactly similar as question 3 posed to the Federal Court in *TR Sandah 1* and question 1 and 2 in *Jeli Anak Naga & 4 Others v Tung Huat Pelita Niah Plantation & Ors and Another Appeal* [2019] MLJU 1311 ('Jeli Anak Naga') as follows:

TR Sandah 1

- A (c) *Whether the Court of Appeal's decision in Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak. (Question 3)
- B

Jeli Anak Naga

- C 1. *Whether the Court of Appeal's decision in Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 that the rights of the natives is confined to the area where they settled and not where they foraged for food is a correct statement of the law relating to the extent and nature of rights to land claimed under native customary rights in Sarawak [Question 1].
- D 2. Whether the alleged practice of the Iban to preserve an area of jungle or forests as 'Pulau' for access for food, wildlife and forest produce, give rise to exclusive rights to the land in the 'Pulau'? [Question 2].

- E [37] Clearly, it could not escape our observation that the questions posed to us which related to the Court of Appeal statement's in *Nor ak Nyawai* are another attempt of relitigating similar questions of law which this court had, with respect, already answered in *TR Sandah 1* and in *Jeli Anak Naga*.

- F [38] Having said that however, these six appeals are coming up from the decisions of the Court of Appeal, revolving around issues of the application of *TR Sandah 1*, *TR Nyutan*, and *Nor ak Nyawai* which directly relate to the 2018 Amendments of the Sarawak Land Code.

- G [39] For these reasons, we think it is improper to simply dismiss the appeals on the basis of procedural impropriety as submitted by the respondents. These appeals come within what Abdul Hamid Mohamad CJ stated in *Asean Security* as an attempt to *revisit* earlier decisions:

- H If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'.

WHAT DOES TR SANDAH 1 DECIDE?

- I [40] The main controversial decision of the majority of 3:1 in *TR Sandah 1* is the ruling by Raus Sharif PCA (as he then was), agreed to by Ahmad Maarop FCJ (as he then was) that the customs of *Pemakai Menoa* and *Pulau Galau* are customs that the laws of Sarawak do not recognise as forming part of the customary laws of the natives of Sarawak and as such, they are customs which have no force of law as envisaged under art 160(2) of the Federal Constitution.

[41] Such view effectively affirmed what the Court of Appeal held in *Nor ak Nyawai* that the rights of the natives are confined to the area where they settled and not where they foraged for food, as a correct statement of the law relating to the extent of natives' rights to land claimed under native customary rights in Sarawak.

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[42] Following the decision in *TR Sandah 1*, an application for review under r 137 of the Rules of the Federal Court 1995 was filed and heard. By a majority of 4:1, the Federal Court dismissed the review application. This is reported in *TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals* [2019] 6 MLJ 141 ('TR Sandah 2').

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[43] We had occasion to peruse the decisions in both *TR Sandah 1* and *TR Sandah 2* and found that the approach taken in questioning the decision of the majority in *TR Sandah 1* is similar with what was raised in *TR Sandah 2* and the present appeals. In fact, similar argument was also taken up and raised in the Federal Court case of *Jeli Anak Naga*.

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[44] We hereby summarise the gist of the parties' submissions on this issue.

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THE PARTIES' SUBMISSIONS

Errors in TR Sandah 1

[45] The appellants submitted that the majority in *TR Sandah 1* fell into a serious error when ruling that *Pemakai Menoa* and *Pulau Galau* as having no force of law, based on the following reasons:

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- (i) failure to consider the recognition of English common law on custom as part of the laws of Sarawak in Rajah's Order No L-4 1928; and the Notes for the Guidance of Officers in Interpreting Order No L-4, 1928. The customs of *Pemakai Menoa* and *Pulau Galau* satisfy the tests and the essential elements of a custom in the above laws and are therefore legally enforceable rights;
- (ii) the nature of the native customary law as being unwritten and *sui generis*, flexible and adaptable to the needs of the community. They do not owe their existence to statute. Rather, the binding effect of the customs comes from the custom being generally accepted and having the assent of the native community. Acknowledgment of only codified customs in

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A statute, which become positive law, undermines the position of the native custom or native customary law as ‘existing law’ under art 162 of the Federal Constitution; and

B (iii) the failure to recognise the method of establishing customary right to land by way of ‘any other lawful method’ in s 5(2)(f) of the Sarawak Land Code.

C [46] On points (i) and (ii) above, the respondents argued before us that the appellants’ line of arguments above have been dealt with and ventilated *in extenso* by the Federal Court in *TR Sandah 1*.

D [47] It was further contended on behalf of the respondents that the Rajah’s Order No L-4 1928; and the Notes for the Guidance of Officers in Interpreting Order No L-4, 1928 are applicable only in respect of certain branches of law which are silent or where laws are yet to be enacted for. Hence, they do not cover land matters because they are already governed by various existing laws such as the Rajah’s Order 1875; the Fruit Trees Order 1899; the Land Order 1920; the Land Settlement Ordinance 1933; Secretariat Circular 1939; *Tusun Tunggu*; and s 5 of the Land Code. As such, the customary practice of *Temuda*

E or clearing of virgin forest for cultivation and the principle of continuous occupation are the only recognised and enforceable NCR. In other words, the omissions in relation to *Pemakai Menoa* and *Pulau Galau* must have been deliberate.

F [48] The respondents further submitted that the decision of the majority in *TR Sandah 1* stands as good law and was followed by subsequent Federal Court decisions in *Jeli Anak Naga and Binglai Anak Buassan & 9 Ors v Entrep Resources Sdn Bhd & 3 Ors* (unreported). The dismissal of the review application in *TR Sandah 2* further strengthens the case that there is no justifiable reason for

G departing from the ruling in *TR Sandah 1* in respect of the customs of *Pemakai Menoa* and *Pulau Galau*.

H [49] Regarding point (iii), the respondents argued that it was not possible for the Federal Court to consider ‘any other lawful method’ under para (f) as the customs claimed must firstly be proved to be lawful within the meaning of art 160(2) of the Federal Constitution. Therefore, although the practices of *Pemakai Menoa* or *Pulau Galau* exist as Iban customs, they are nevertheless not legally enforceable.

I *The ruling on Pemakai Menoa and Pulau Galau — 3:1 or 2:2? Legal reasoning versus decision*

[50] The appellants submitted that it is the legal reasoning and not the decision that binds the courts below in the application of the principle of stare

decisis. Hence, stare decisis was argued to be operative only when there is conclusive legal precedent.

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[51] In this respect, the appellants argued that revisiting *TR Sandah 1* is necessary for want of clarity on the legal position because a close scrutiny of the ruling on *Pemakai Menoa* and *Pulau Galau* reveals that there was, in actual fact, a split of 2:2 and not 3:1. This is because, Abu Samah Nordin FCJ who formed part of the majority viewed that *Pemakai Menoa* and *Pulau Galau* are legally recognised customs — consistent with the dissenting view of Zainun Ali FCJ — but which must be proved on evidence, which in his view, the appellants had failed to do.

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[52] Therefore, the appellants urged that this court would, in fact be obliged to look at the reasoning rather than the decision in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau*. The appellants argued that since there is no majority decision on the principle of law relating to *Pemakai Menoa* and *Pulau Galau*, there is no obligation by the courts below, by way of stare decisis, to apply the decision of *TR Sandah 1*, and so, this court is at liberty to differ from what Raus Sharif PCA and Ahmad Maarop FCJ held on *Pemakai Menoa* and *Pulau Galau*.

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[53] The respondents on the other hand contended that this line of argument has been raised in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and the Federal Court has consistently confirmed that the decision in *TR Sandah 1* is a decision of the majority of 3:1 and not 2:2.

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[54] The respondents further argued that departing from *TR Sandah 1* would mean departing from all other decisions of the Federal Court adopting and confirming the said decision, which effectively will result in further uncertainties and chaos, considering the statutory intervention by the 2018 Amendments to the Sarawak Land Code.

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Judicial precedent in the apex court — When to depart from earlier decision?

[55] At the outset, we are fully aware of the facts that these lines of submissions challenging/defending *TR Sandah 1* were raised, presented and argued in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and the Federal Court had, in these cases found no reasons to depart from its earlier decision in *TR Sandah 1*.

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[56] Faced with similar application of reviewing or revisiting this court's earlier decisions, we think it is proper to first lay down the legal principles governing the exercise of power to revisit earlier decisions in the context of the rule of judicial precedent in the apex court.

- A [57] The case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip Bhagwan') provides guidance as to what factors to consider when dealing with the question of judicial precedent and its exceptions. The first factor where this court may depart from earlier decision is the existence of conflicting decisions of the Federal Courts over the same subject matter. *The other factor is decision made per incuriam — which correction of error is normally dependent on legislative process.* It was held that:
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C The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v London County Council* (1898) AC 375 that it was bound by its own previous decision in the interests of *finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.*

- D However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the Practice Statement (Judicial Precedent) 1966 which is set out below:

E Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of *certainty* upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

- F Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, *to depart from a previous decision when it appears right to do so.*

- G [58] Our judicial history shows that this court had previously undertaken such exercise of overruling or departing from earlier decisions in the context of the standard of proof at the end of prosecution's case. We see how the law had developed where the ruling of the Supreme Court in this respect in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 was overruled by the Supreme Court in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 which subsequently was partly overruled by the Federal Court in *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514. *Tan Boon Kean* was in turn overruled by the majority judgment of the Federal Court in *Arulpragasam all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1. The 'beyond reasonable doubt standard' by the majority of 4:3 in *Arulpragasam* led to the amendment to the Criminal Procedure Code in 1997 via Act A979 which took effect on 31 January 1997, which saw the articulation of the prima facie proof that the prosecution is obligated to establish before the accused person is legally obliged to enter on his or her defence.
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[59] So, we see how the Federal Court in *Dalip Bhagwan* case guides us in dealing with the questions of the application of judicial ruling for the courts

below by way of stare decisis and the impact of a legislative action in the following manner:

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When leave was granted in February 1991 to refer Question 2 posed to us and as set out above, and for that matter, when the High Court heard the appeal in 1990 from the decision of the sessions court in question, *the legal position of the burden of proof at the close of the prosecution's case was still governed by the test of prima facie case as in Munusamy's case*, so in answering the question cast in the past tense to indicate 1990, it should be borne in mind that the position of law referred to was as in 1990.

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The answer to Question 2 therefore is in the affirmative.

In this connection, if Question 2 had not been framed in the past tense so as to require an answer applicable in 1990 about the burden of proof at the close of the prosecution's case, *but if it were cast in the present tense instead, then it is piquant that the sessions court would have been right in so assessing the reliability, etc of prosecution witnesses at the close of the prosecution's case, because, at the time of our hearing this reference, the burden of proof beyond a reasonable doubt at the close of the prosecution's case as enjoined by the ratio of the Arulpragasam's case would be applicable subject to what we have to say about the latest amendment to the Criminal Procedure Code (FMS Cap 6).*

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The true position of the legal burden of proof at the close of the prosecution's case with regard to the amendment to the Criminal Procedure Code in question would have to be dealt with as the said amendment had already come into effect before we heard this criminal reference. We should deal with it presently.

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The said amendment would apply, in our view, only to an act or omission constituting a criminal offence committed on or after 31 January 1997, and not to any such act or omission before 31 January 1997. For such act or omission committed before 31 January 1997, the test laid down in Arulpragasam's case, ie that of proof beyond a reasonable doubt at the close of the prosecution's case, would still apply. We have to and we would presently give our reasons for saying so.

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Parliament has plenary power to make retrospective criminal and civil law vide *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, but when it makes such retrospective criminal law, it must steer clear of art 7, or for the purpose of the instant case, art 7(1) of the Federal Constitution.

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[60] In the present case, both factors mentioned in *Dalip Bhagwan* case above are absent — conflicting apex court's decisions or per incuriam. In fact, *TR Sandah 1* has gone through at least three judicial scrutinies in *TR Sandah 2*, *Jeli Anak Naga* and *Binglai Anak Buassan* and in these cases, the ruling on *Pemakai Menoa* and *Pulau Galau* by Raus Sharif PCA supported by Ahmad Maarop FCJ was not shown to be made per incuriam. There was also no prior Federal Court decision in direct conflict with *TR Sandah 1*. Therefore, the question that needs to be asked is whether there is a necessity to revisit or review *TR Sandah 1*?

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A [61] With respect, our answer is that we do not find the need to do so. In the Federal Court case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 (“Tunde Apatira”), the prosecution invited the court to depart from its ruling against double presumption in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 that was argued to be wrongly decided and ought no longer to be applied. In rejecting the prosecution’s submission on the alleged errors in *Muhammed bin Hassan*, Gopal Sri Ram JCA delivering the judgment of the court stated three reasons for such rejection — recent superior court decision; certainty; and the logic and reasoning of earlier decision based on the construction of statutory provision. He held as follows:

C With respect, we are unable to accept the learned deputy’s invitation to depart from *Muhammed bin Hassan* for three reasons. In the first place *Muhammed bin Hassan* is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v Shivpuri* [1986] 2 All ER 334.

D The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts (see, *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh v Public Prosecutor* [2000] 4 MLJ 71. If we accept the learned deputy’s invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts.

F The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts (see, *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh v Public Prosecutor* [2000] 4 MLJ 71. If we accept the learned deputy’s invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts.

G Lastly — and this is the most important reason — we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s 37(da) of the Act. The logic and reasoning for interpreting that subsection in the way in which it was done in *Muhammed bin Hassan* appear sufficiently from the judgment in that case. It requires no repetition. All we need say is that para (da) of s 37 is differently constructed from para (d) of that section and must therefore carry a different meaning. As the Act is a penal statute, any ambiguity in language should be resolved in an accused’s favour: *Sweet v Parsley* [1970] AC 132.

I For the foregoing reasons, we reject the argument of the respondent to the effect that *Muhammed bin Hassan* was wrongly decided and ought no longer to be applied.

[62] In fact, the decision of the Federal Court in *Muhammed bin Hassan* was also attacked by the prosecution who sought to revisit the ruling on the ‘double presumption’ in subsequent case of *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685, where, by a majority of 6:1, it was held that there was no valid basis or justification for revisiting *Muhammed bin Hassan*.

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[63] Applying the above guidance, in particular the third reason on the aspect of interpreting the law in *Tunde Apatira*, we found that the ruling on *Pemakai Menoa* and *Pulau Galau* was based on an extensive assessment of the laws — both written and unwritten. And the differences, if any, between the judges in *TR Sandah 1* were due to their individual interpretation and construction of the written laws vis a vis the unwritten law — the customary law. It is therefore not appropriate for this court to determine whether or not they interpreted or applied the law correctly, for that is a matter of opinion (*Asean Security*).

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[64] Moreover, the ruling in *TR Sandah 1* has been addressed through a legislative intervention by way of amendments made to the Sarawak Land Code in 2018. Such intervention is what the Federal Court in *Dalip Bhagwan* case had referred to as ‘the correction of error was normally dependent on the legislative process’.

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Pemakai Menoa and Pulau Galau — Termed as ‘Native Territorial Domain’ in 2018 Amendments

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[65] The appellants argued that *Pemakai Menoa* and *Pulau Galau* — the recognised customs in the 2018 Amendments to the Land Code render *TR Sandah 1* as being legally obsolete and overturned.

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[66] It was submitted that the amendment to the Sarawak Land Code in 2018 which came into force on 1 August 2019 had the effect of reversing the wrong ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1*, hence the need to apply the amendment to these appeals as they have not been finally concluded.

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[67] In this regard, the respondents replied that s 6A that was added to the Sarawak Land Code does not apply to the present cases because the appellants in the present appeals have not applied for the said Native Territorial Domain (‘NTD’).

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[68] It was further submitted that NTD under s 6A is an additional claim above a claim for NCR under s 5 of the Sarawak Land Code. Therefore, the 2018 Amendments do not in any way nullify or reverse or overturn *TR Sandah 1*, nor does it have any retrospective effect, for these cases were filed, heard and

A decided at the courts below way before its date of in force on 1 August 2019.

[69] The respondents contended that the 2018 Amendments also render the questions seeking to review the ruling on of *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* and *Nor ak Nyawai* as academic because the amendments
B clearly recognise these customs as having the force law subject to the requirements and limitations under the said Sarawak Land Code.

[70] It is to be emphasised at the outset that none of the posed questions of law for this court's decision explicitly requires a determination of the effects of the 2018 Amendments to the Sarawak Land Code to *TR Sandah 1* or *TR Nyutan* or *Nor ak Nyawai*. Nevertheless, we find that a discussion on the effects of the 2018 Amendments to be inevitable for that legislative move was specifically undertaken in response to the Federal Court's decision in *TR Sandah 1* and *TR Nyutan*. We noted that all relevant parties in these appeals
C had submitted on the amendments, orally as well as in the written form.
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[71] Clearly, one of the objectives of the 2018 Amendments is to statutorily recognise *Pemakai Menoa* and *Pulau Galau* within the scheme of the present SLC, as customs having the force of law in s 6A — but which is termed as Native Territorial Domain for inclusiveness, on which a Native Communal Title in perpetuity will be conferred and be treated as any title granted under the Land Code and the proprietary interest in that title would be indefeasible by virtue s 132 of the SLC.
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[72] The key aspects of s 6A, apart from the legal recognition of *Pemakai Menoa* and *Pulau Galau*, is the issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein. And although the claim is limited for up to 500 hectares or 1,000 hectares accordingly, the NTD rights exercisable within the NTD may be claimed above and over a NCR under s 5 of the SLC.
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[73] The Deputy Chief Minister and Minister for Modernisation Agriculture, Native Land and Regional Development YB Datuk Amar Douglas Uggah Embas, on the second reading of the Land Code (Amendment) Bill, 2018 on 11 July 2018 stated in clear terms the background to the amendment and the objectives it sought to achieve in respect of *Pemakai Menoa* and *Pulau Galau* as follows:
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... Tuan Speaker today is a historic moment for the natives of Sarawak. Why? Because we are finally going to see the light of day in respect of native land rights on *Pemakai Menoa* and *Pulau Galau* territorial domain with the tabling of this amendment bill.

Tuan Speaker, the landmark outcome of this proposed Land Code (Amendment) Bill, 2018 is to enable native communal title in perpetuity to be issued over an area to be described as native territorial domain ...

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Tuan Speaker, for the natives of Sarawak, land is regarded as an important part of their livelihood. Their customs and their culture revolve around their lands which are their heritage, passed on or inherited from generation to generation.

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Tuan Speaker, more importantly, the natives rely on the land for farming, foraging for food, hunting, fishing and as an important source of materials for domestic purposes. Because of this cultural significance, they have very strong sentiment and attachment to their land.

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By adopting the Torrens System for the State's Land Administration System, these cherished customs and practices were not all incorporated into our Land Laws for the creation or acquisition of ownership and proprietary rights to land which the natives have long regarded as their ancestral land. Specifically, our written laws did not expressly stipulate the existence of customs *Pemakai Menoa* and *Pulau Galau*, or the equivalent native territorial domain of other communities and thus this has affected its recognition.

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This shortcoming in our laws is manifested in the Judgment of the Federal Court in the case of *Director of Forests, Sarawak and State Government of Sarawak v Tuai Rumah Sandah anak Tabau and 7 Ors*, delivered on 20th December 2016. In this case, The Federal Court had ruled that the native customs of *Pemakai Menoa* and *Pulau Galau*, although practised by the Iban communities, have no force of law in Sarawak. As a result, the claim by Tuai Rumah Sandah and his anak biaks to ownership rights over land which, according to their own custom, is their *Pulau*, was dismissed by the Federal Court.

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The Federal Court had also ruled that the practice of *Pemakai Menoa* and *Pulau Galau* was never recognised to have created customary rights to land by any of the laws passed by or during the Brooke's era or by the State's Legislature. *Pemakai Menoa* and *Pulau Galau* or its equivalent customs of other natives are also not expressly provided for in any of the codified Natives' Adats.

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The Federal Court's decision presented the State Government with the opportunity to review the existing laws relating to the acquisition of rights to land based upon the customs of the native communities in Sarawak. Through this review, any legal impediment to all the native communities to lawfully acquire proprietary right in land would be addressed, to meet the expectations of all native communities to get legal recognition of their rights to land acquired in accordance with their own customary laws. The Judgment of the apex Court of this country has a profound impact on the rights of the natives which, in accordance with their customs, is their land. Leaving the Judgment as it stands is not an option ... The amendments are necessary to give the customs and practices relating to territorial domain, the force of law.

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Under the Bill, we use the term native territorial domain instead of *Pemakai Menua* and *Pulau Galau* for inclusiveness — because the practice relating to native territorial domain is not only practised by the Ibans, but also all other native communities in Sarawak. In the case of *Rambli Kawi, Superintendent of Land and*

A *Survey*, the courts have also recognised the concept of ‘cari *makan*’ of the Malays equivalent to *Pemakai Menua* and *Pulau Galau*. Thus, this amendment is inclusive and relevant to all the natives.

B Tuan Speaker, it must be noted, although the dissenting judgement of Yang Arif Zainun Ali, in *Tuai Rumah Sandah*’s case gives legal recognition to *Pemakai Menua* and *Pulau Galau*, but such right is only limited to usufructuary rights, this means that the natives have the right to only use the resources within the *Pulau Galau* and *Pemakai Menoa* for their livelihood but they do not have any legal ownership any propriety rights of the land within those area.

C Tuan Speaker, this Land Code (Amendment) Bill, 2018, will not only recognise but also give legal effect to the territorial domain. Clause 2 of the Bill through the definition of ‘native communal title’ expressly provided that a title in perpetuity will be issued in accordance with section 6A over a native territorial domain and that such native communal title shall be held to be a title under the Land Code. This means, that the right under native territorial domain is a statutory proprietary right and not just limited to usufructuary right as recognised under common law and the decision in *Tuai Rumah Sandah*’s case.

E [74] Upon perusing s 6A, we are of the opinion that sub-s (6) is a crucial provision for it places importance on the date of in force of the amendment — 1 August 2019 and the finality of court’s decision in respect of a claim on NTD. Above all else, the customary practices of *Pemakai Menoa* and *Pulau Galau* have been given statutory recognition, having the force of law, the very crucial element that was found wanting or lacking by the Federal Court decision of *TR Sandah 1* and *TR Sandah 2* that had denied those customary practices legal enforceability.

G [75] This provision prevents a claim for NTD to be made or allowed on any area or land where there is a final decision by a court of competent jurisdiction prior to 1 August 2019. Subsection (6) of s 6A reads as follows:

H (6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim.

I [76] Considering the background to the 2018 Amendments, with the introduction of s 6A, this provision means that whatever the Federal Court has decided, as a final arbiter, as in *TR Sandah 1* or *TR Nyutan* in respect of the NCR thereof, any claim over those lands or areas concerned shall not be made or allowed, with the coming into force of the 2018 Amendments on 1 August 2019 that statutorily recognised *Pemakai Menoa* and *Pulau Galau*. In other words, sub-s (6) of s 6A preserves those disputed area or land in *TR Sandah 1* or *TR Nyutan* from any further claim based on NTD under s 6A.

[77] It also means that a claim for NTD can be made in respect of any area or land where there is no final decision by a court of competent jurisdiction before or after 1 August 2019. The final decision in this provision refers to a decision by the highest court of the land — the Federal Court; and not by the trial High Court or the Court of Appeal, because any decision obtained at these two stages are appealable further rendering their decision as not a ‘final decision’ within the meaning of s 6A(6). Unless, of course, subject to an important caveat, which is that there was no appeal filed against such decisions so obtained in the lower courts.

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[78] Hence, although the 2018 Amendments to the SLC do not contain any express provision to say that those amendments are intended for it to operate retrospectively, the words in s 6A(6) in respect of the NTD provide a ‘saving’ clause to courts’ decisions that had been finally decided prior to 1 August 2019, as opposed to those which have not been finally decided, as either pending trial, or appeals which have yet to be finally determined.

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[79] The 2018 Amendments have the effect of statutorily overturning the ruling in *TR Sandah 1* in respect of *Pemakai Menoa* and *Pulau Galau* effectively on 1 August 2019. In other words, the majority ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* stands as good law from the date of its decision on 20 December 2016 until 31 July 2019. And all final decisions following *TR Sandah 1* handed down before 1 August 2019 are, by necessary implication, similarly preserved.

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[80] Based on the foregoing deliberations, to revert to the questions of law on the need to review or depart from earlier decision in *TR Sandah 1*, *TR Nyutan*; to assess the correctness of the Court of Appeal statement in *Nor ak Nyawai*, our answers are as follows.

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[81] On the question of law in *Case A* as to whether it is correct in law or proper for the Court of Appeal to set aside the trial judge’s finding of fact based on the application of the decision in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors* (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (‘NCR’) land situated at *Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit*) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, our answer is in the affirmative.

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[82] It is to be highlighted that when the Court of Appeal heard and decided the appeal on 13 July 2017, it was still legally bound by the principle of stare decisis to follow the ruling of the Federal Court made on 20 December 2016. We refer specifically to the guidance by the Federal Court in *Dalip Bhagwan’s* case as stated at para [56] of this judgment.

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A [83] As for the question of law in *Case B* as to whether the majority decision of Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors* (*suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit*) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1 with respect to customary practices of *Pemakai Menoa* and *Pulau Galau* should be reviewed, and overturned, and *Pemakai Menoa* and *Pulau Galau* restored as customary practices having the force of law, our answer is in the negative based on the reasons stated above at paras [54]–[78]. As explained, *Pemakai Menoa* and *Pulau Galau* are customs having statutory force in the current scheme of a communal title in s 6A of the SLC as opposed to individual title.

D [84] As for questions (i) in *Case C* in respect of the correctness or otherwise of the decision of the Court of Appeal in *Nor ak Nyawai* that the rights of the natives is confined to the area where they settled and not where they foraged for food, our answer is in the affirmative for reasons stated at paras [54]–[78] above, in particular that this question has been dealt with quite extensively by this court in *TR Sandah 1* which upheld and affirmed the said statement by the Court of Appeal; and so, the same question was posed in *Jeli Anak Naga* and was answered affirmatively as well. We find there is no valid reason for reviewing or revisiting the correctness or otherwise of the Court of Appeal said decision, especially when this matter has been put to rest by the 2018 Amendments to the SLC, acknowledging *Pemakai Menoa* and *Pulau Galau* as part of legally enforceable NCR.

G [85] As a corollary, by answering question (i) of *Case C* above in the affirmative, the question at (ii) as to whether the alleged practice of the Iban to preserve an area of jungle or forests as *Pulau* for access for food, wildlife and forest produce, give rise to exclusive rights to the land in the *Pulau* shall be answered in the negative.

H [86] As for the question in *Case D* which asks whether the Federal Court should depart from the decision of the Federal Court in *TR Sandah 1* on the question of *Pemakai Menoa* and *Pulau Galau* having no force of law and that of *TR Nyutan* on the indefeasibility of the lease of State Land and if so, whether those cases have any significant bearing on the decision of the learned judicial commissioner in any event, our answer to the first part of the question is in the negative. The reasons are as stated in paras [54]–[78] above. At the risk of repetition, we shall state that those decisions in *TR Sandah 1* and *TR Nyutan* stand as good law as at the date of the pronouncement of those judgments until the date of in force of the 2018 Amendments of the SLC on 1 August 2019.

[87] And effectively, those decisions shall have significant bearing on the

decision of the learned judicial commissioner at the time of his decision on 17 January 2018. The case of *TR Nyutan* shall be elaborated further in the later part of this judgment.

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[88] At the risk of repetition, when the High Court and the Court of Appeal heard these cases, the legal position on *Pemakai Menoa* and *Pulau Galau* and the question of indefeasibility of title and extinguishment (which will be elaborated later) were still governed by the ruling in *TR Sandah 1* and *TR Nyutan* respectively.

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[89] Based on the foregoing reasons, on the main question of reviewing or revisiting the case of *TR Sandah 1* and *TR Nyutan*, we find that there is no reason for so departing from those decisions; and hence, the application of these decisions by the courts below, in their decisions which were made prior to the date of in force of the 2018 Amendments to the SLC, was correct and proper as those decisions stand as good law until the legislative intervention which takes effect on 1 August 2019.

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TR Nyutan — On indefeasibility of title and extinguishment of NCR

[90] Three questions of law relate to the issue of indefeasibility of title and extinguishment of NCR in these appeals. They are questions 3 and 4 in Case C and part of the question posed in Case D, as follows:

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Case C

(iii) Whether an extinguishment exercise of native customary rights over land as provided under section 15 of the Sarawak Land Code (Cap.81) is required prior to the alienation of lease of state land; and

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(iv) If the answer to (iii) is in the affirmative, whether the lease of state land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native customary rights to be excised out or excluded from the lease of state land.

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Case D

Whether the Federal Court should depart from the decision of the Federal Court in ... *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan ak Jami & Ors and other appeals* [2018] 1 MLJ 77 on the indefeasibility of the Lease of State Land and if so, whether those cases have any significant bearing on the decision of the Learned Judicial Commissioner in any event?

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What does TR Nyutan decide?

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[91] The Federal Court in *TR Nyutan* held that unless there is proof of fraud, 's 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over land in the

A manner prescribed under the same Code. A claim for NCR does not defeat the indefeasibility of title of land, even though the interest stated in the issue document of title was issued after NCR was asserted’.

B [92] The Federal Court further held that ‘the proper remedy for the infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment thereof, is an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties’.

C THE PARTIES’ SUBMISSIONS

D [93] It was submitted on behalf of the appellants that alienation of NCR land prior to its legal extinguishment under the Sarawak Land Code is illegal, void and of no effect and consequently the question of indefeasibility of title under s 132 of the SLC does not arise or becomes irrelevant.

E [94] It was further claimed that indefeasibility of title can be set aside not only on the basis of fraud but also on grounds of insufficient or void instrument or where the title or interest is unlawfully acquired — based on the clear words of ‘Subject to this Code’ appearing at the opening of s 132. Indefeasibility of title in s 132 must therefore be examined together with other provisions in the SLC.

F [95] Hence, *TR Nyutan’s* decision on indefeasibility of title must not only be distinguished due to the factual and contextual differences of that case and the present appeals, but also be overruled for lack of clarity on the ‘net effect of the principle of indefeasibility’ which is subject to certain circumstances, which in the context of the SLC, be subject to other provisions of the SLC — in this case, on the rights of the natives to NCR land.

G [96] In this respect, NCR over a land is argued to be an encumbrance on the radical title held by the State, as well as on the title held by a registered proprietor. Therefore, the issuance of a lease does not automatically confer indefeasibility of title if NCR is proven to be within the said lease.

H [97] Consequently, where NCR exists, alienation of the land is prohibited until and unless there is prior extinguishment of the said NCR, based on s 15. Furthermore, the SLC does not provide for automatic extinguishment or termination of NCR once a provisional lease is issued. Other provisions were highlighted as conferring statutory protections to NCR. They are ss 4(4), 5(3), 13(1), 15, 18 and 28 of the SLC.

I [98] The respondents on the other hand argued that based on the decision of

the Federal Court in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766 ('Husli') and *TR Nyutan*, alienation of the disputed land to third parties had the effect of extinguishing NCR, hence the right to seek for compensation from the State is provided under s 197 of the SLC.

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[99] The respondents also cited the case of *Mabo and others v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 to show that at common law, if the sovereign government grants an interest to another party which is inconsistent with the native rights, then this extinguishes the native title for the area concerned.

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[100] Moreover, the respondents argued that fraud was never pleaded in these appeals, and as such the registered proprietor held indefeasible title to the land in question.

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[101] On the issue of indefeasibility of title, the respondents further submitted that the 2018 Amendments affect provisional lease only and not a lease proper. Therefore, a registered proprietor issued with a lease of State land holds an indefeasible title.

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Is NCR a factor subjecting indefeasibility of title?

[102] It is undeniable, at first blush, that the argument advanced by the appellant on the reading of s 132 of the SLC is rather compelling — that what controls indefeasibility of title is not only confined to what has been expressly stated in the said provision — namely, the fraud factor, but also other vitiating factors — such as, the NCR, based on the opening words of s 132 — 'Subject to this Code'.

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[103] Section 132 of the SLC reads:

(1) *Subject to this Code*, the registered proprietor of any estate or interest in land to which this section applies shall, *except in the case of fraud*, hold such estate or interest subject to the interests noted on the Register but free from all other interest except ...

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The variations of the meaning of words in the phrase 'subject to'

[104] The meaning of 'subject to' has been defined by the Federal Court in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309 as 'conditional or dependent upon something', indicating that the provision containing such words 'does not stand alone on its own and must not be read on its own'. Hence, the words in the phrase 'subject to' must be a factor to be considered in interpreting any section in a statute. In

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- A the context of that case, the term ‘subject to’ in the beginning of s 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993 is not merely an enabler, but is an important part of the provision which may determine the manner in which the provision is to be read and construed.
- B [105] In *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] 1 MLJ 121, the main issue relates to the construction of the meaning of ‘subject to the provisions of any existing law’ in art 140(1) of the Federal Constitution and ‘Subject to the provisions of any existing law and to the provisions of this Constitution’ in art 144(1) of the Federal Constitution.
- C Thomson CJ considered the words ‘subject to’ as *words of limitation or restriction* in conformity with what was said in *Smith v London Transport Executive* [1951] AC 555; [1951] 1 All ER 667 where Lord Simonds stated that the words ‘are apt to enact that the powers thereafter given are subject to
- D restrictions or limitations to be found elsewhere’. His Lordship further said:
The words ‘subject to the provisions of this Act’ ... are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found.
- E [106] Neal J (dissenting) in his endeavor to ascertain the meaning of the words ‘subject to’, found that the *words are given not one meaning but varied meanings*. We reproduce below what Neal J had thereby stated, like so:
- F I have searched — and I hope diligently — the various authorities in which the words, ‘subject to,’ have been the subject of construction by the Courts ... My research in the law reports and text books of the British Commonwealth has shown that the Courts have given to the words, ‘subject to,’ not one meaning but varied meanings. They range from the words, ‘subject to,’ having the effect of the words following it negating the statement preceding it as is particularly to be noticed in the long line of authorities dealing with the phrase, ‘subject to contract,’ ‘subject to lease,’ etc. This particular meaning of the phrase, ‘subject to,’ was referred to by Stout CJ. in the *New Zealand case of Benge & Pratt v Guardian Assurance Company* (1915) 34 NZLR 81 86 when he said, ‘subject to’ must mean from that point of view ‘swallowed up’ or ‘negated by’.’ The meanings in the various authorities in the British Commonwealth go to the other extreme in limiting their effect as did Denman CJ, in *Rex v Churchwardens of St James, Westminster* (1836) 111 ER 1213 when he said, ‘The language is not entirely free from doubt; but, considering that a certain custom had long prevailed without question, the phrase, ‘subject to the laws and statutes now in force,’ must be taken as a description of the existing practice.’ This diversity of meaning and the need to consider the entire document are emphasised when we note in two decisions of the Privy Council one year apart the judgment of the same Law Lord, Lord Simonds, where the words, ‘subject to,’ are given the contradictory meanings of ‘without prejudice to’ that is to say with no restriction on what is being qualified and ‘the words subject ... are naturally words of restriction’. The two cases I refer to are *Smith v London Transport Executive* [1951] AC 555; [1951] 1 All ER 667 and *Akistan Apena of Ipоро v Akinwande Thomas*

[1950] AC 227 234. Remembering the words of Maugham J, in *In re Dunkley v Sullivan* [1930] 1 Ch 84 87; [1929] All ER Rep 564 where he held that the words, 'subject to the provisions contained in the will', must mean 'subject to all the provisions of the will which remain operative and effective,' I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought to give to the words, 'subject to,' is following Denman C.J. 'Subject to the procedural limitations of,' or alternatively to follow the wording of Lord Simonds in *Smith's* case and to say the jurisdiction is given to be exercised 'within the restrictions or limitations imposed by,' and this meaning is well within the limits of the range of meanings given to the words, 'subject to,' by the Courts throughout the British Commonwealth; and although I deprecate — as has been done by others before me — extracting a word from its context to ascertain its meaning, having extracted it I see no reason for altering or doubting the correctness of the interpretation I have given it as a whole.

[107] On appeal to the Privy Council as reported in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169, Lord Denning disagreed with the interpretation adopted by the majority and held that the words 'subject to the provisions of any existing law' in art 144(1) meant only that the Police Service Commission shall operate pursuant to existing laws which are not in conflict with the Constitution. In case of conflict between existing law and the Constitution the latter must prevail and as such it is necessary for the court to modify the existing law under the authority of art 162.

[108] The variation given to the meaning of the words 'subject to' as shown by Neal J is reflected in the current decision of the Federal Court in *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 MLJ 236 where Rohana Yusuf PCA interpreted the words 'subject to the provisions of this Part' as requiring a *holistic reading of the entire provisions* relating to citizenship including the main Article, the qualifications provisions in Part II of the Second Schedule and the interpretation section of the Supplementary Provisions relating to citizenship in Part III of the Second Schedule, *without severing one part from another*.

[109] On the other hand, Nailini Pathmanathan FCJ describes the words 'subject to' as having *two possible meanings* — *as a referencing phrase, to cross-refer one provision to another which has the effect of linking a main provision to an exception or variants to the main rule; or as a phrase introducing a conditional provision*. In the context of the case, Her Ladyship viewed that the words 'Subject to' serve the purpose of conjoining or bridging the governing provisions with Part II and III of the Second Schedule. Hence the words 'subject to' in s 1, Part II, comprise a cross-reference to Part III, *if and where relevant*; and the words 'Subject to' in s 1 Part II do not have the effect of

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- A imposing a condition because an interpretive section providing for variants and exceptions to the primary rule cannot override the central thrust of a right to citizenship. This approach of interpretation was similarly adopted by Tengku Maimun CJ, that supplementary provisions in Part III of the Second Schedule cannot be read as qualifying or conditionalising the application of Part II by virtue of the phrase ‘subject to the provisions of Part III of this Constitution’ as appearing in s 1 of Part II of the Second Schedule.

- C [110] The variation in interpreting the words ‘subject to’ is also evident in the Singapore case of *Public Prosecutor v Richard Kwan* [1970] 2 MLJ 286 (CCA) where Wee Chong Jin CJ considered that the expressions ‘subject to this Code’ and ‘subject to the other provisions of this Code’ in the Criminal Procedure Code as having exactly the same meaning and that these expressions mean no more than to draw the attention of everyone that the particular section in which either of these two expressions appear may be *qualified* by other provisions of the enactment. Yong Pung How CJ in *Ramanathan Yogendran v Public Prosecutor* [1995] 2 SLR 563, when referring to *Richard Kwan*, however stated that the word ‘qualified’ in *Richard Kwan* does not connote the meaning of ‘restriction’ or ‘curtailment’. He opined that the common occurrence of the words ‘subject to’ does not, and indeed cannot, connote that one section overrides the other. It means that in reading one section, one should take the other into account.

- F [111] Clearly, the variations that exist in construing the meaning of the words ‘subject to’ show that interpreting the said words is not entirely free from difficulty despite its seemingly innocuous brevity, as expressed in just a two-words phrase. On the one hand, it is treated as qualifying, restricting or conditioning the application of a provision, and on the other hand, it is treated as merely linking a provision to another which is to be read and applied, if and where relevant, without making a provision overriding another.

Understanding the Code and its scheme — Avoiding speculation of policy or intent

- H [112] In attempting to discover the meaning of the words ‘Subject to this Code’ we find it crucial to understand the entire scheme of the SLC — which provides for a legislative framework for the classification of land; alienation of state land; administration of alienated land; settlement of native customary rights; cadastral survey; registration of dealings in land; the development of land; offences and sanctions; arbitration; and some procedural matters — all in ten parts of 248 sections and two schedules.

[113] Reading a statute as a whole in the quest of understanding its entire scheme is what is considered the elementary rule by Viscount Simonds in *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] AC 436

(HL) that:

... the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

[114] And reading a statute as a whole includes reading the amendments that have come into force and the related provisions which are capable of shedding light on the interpretive problem at hand. As stated by Lord Reid in *Inland Revenue Commissioners v Hinchy* [1960] 1 All ER 505 (HL):

one assumes that, in drafting one clause of a bill, the draftsman had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act.

[115] And that is because of the presumption that the Legislature is competent and well informed, that the language is used consistently, that tautology is avoided, that the provisions of an Act all fit together to form a coherent and workable scheme (*Sullivan on the Construction of Statutes* (6th Ed, LexisNexis, 2014) at p 405).

[116] In the process of understanding the SLC, we discovered that the words 'Subject to this Code' appear not only in s 132(1) but also in three other places in the SLC — s 29(1) on temporary licenses; s 88 on general powers of settlement officer; and s 130(2) on joint tenants.

[117] Bearing in mind the existence of the same words in other parts of SLC, it is crucial that in an attempt to define the meaning of 'Subject to this Code', we must not lose sight of the effects of the meaning that will be given to the words 'Subject to this Code' to the operation of other parts of the provisions which employ similar words — for consistency and clarity in interpreting statutory provision is imperative.

[118] Moreover, it is presumed that the legislature uses language carefully and consistently so that within a statute, the same words have the same meaning and different words have different meanings — because 'Giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation (*R v Zeolkowski* [1989] 1 SCR 1378). Hence, when the same words or expressions appear more than once in a statute, they should receive the same meaning unless the context suggests otherwise, or a contrary intention inevitably or irresistibly appears (NS Bindra's *Interpretation of Statutes* (9th Ed, 2002) at p 645).

[119] In the context of the present case before us, the phrase employed in the

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A beginning of s 132 of the SLC is ‘Subject to this Code’. The Code refers to the Sarawak Land Code in its entirety. And we know the Sarawak Land Code deals not only with NCR but a variety of other matters — alienation, registration, procedural provisions, power conferring provisions, entitlements, rights and liabilities, offences, dispute resolution provisions, to name but a few.

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[120] Now, with reference to the Sarawak Land Code generally, though prima facie, it appears not to be problematic nevertheless, it becomes less than clear, according to the appellants, when applied in the context of the question — namely, as to whether NCR is a factor qualifying indefeasibility. As the High Court of Australia noted in *Bowtell v Goldsbrough, Mort and Company Ltd* (1905) 3 CLR 444; (1905) 12 ALR 82; (1905) 23 WN (NSW) 40i; [1905] HCA 60 in the words of O’Connor J that ‘When general words are used in a Statute, it sometimes becomes doubtful when the Statute is applied to its subject-matter, whether the Legislature intended the words to be used in a general, unrestricted sense, or with special reference to the subject to which they relate’. His Lordship referred to Maxwell, *Interpretation of Statutes* (3rd Ed) at p 28 that ‘General words’:

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admit of indefinite extension or restriction, according to the subjects to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise, also, much that was not; or, be so restricted in meaning as not to reach all the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a Statute, there is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment with the degree of accuracy necessary for determining whether a particular case falls within it.

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[121] In so identifying which aspect in the ‘Code’, apart from fraud (which is specifically stated in s 132), is a factor qualifying indefeasibility, we find the exercise is arbitrary — for that path would compel us to pick and choose matters that fall within the general ‘Code’ as qualifying indefeasibility. It is also trite that an interpretation of statutory provision that leads to unpredictable, ambiguous result ought to be avoided.

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[122] At this juncture, we can do no better than to quote the statement by Burton J in *Warburton v Loveland d Ivie* (1828) 1 Hud & B 623 which was later affirmed by the House of Lords:

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I admit that the generality of words may properly be restrained within the limits of the declared or implied policy of the statute, the more especially if a construction, to the full extent of its phrase, would lead to any repugnance or inconsistency in its provision. That policy is, however, I conceive, only to be looked for in the statute itself, and not to be either enlarged or contracted, upon merely speculative grounds — a mode of construction that always incurs the hazard, and has, perhaps in some instances,

- produced the effect of legislating in the form of exposition. A
- [123] As a piece of legislation for the administration of land in Sarawak, the SLC was promulgated to feature the Torrens system — a system of land title by registration, through which a registered proprietor shall hold indefeasible title to the land. It is also a written law that acknowledges the NCR. This is clearly evident in various sections specifically for regulating NCR related matters — they are ss 2, 4, 5, 6, 6A, 10, 13, 15, 18, 18A, 28, 82 and 197. B
- [124] While NCR is statutorily acknowledged, does it mean that it is the policy of the SLC or the intent of the legislature to regard it as a factor qualifying indefeasibility, as envisaged by that phrase posturing itself as the opening salvo in s 132(1) of the SLC? With respect, in the absence of a clear and unambiguous express provision to that effect, we are not ready to conclude that the NCR, in the scheme of the SLC makes a qualifying factor to indefeasibility of title. As it stands now, fraud is the *only* stated factor, if pleaded and established by the party who asserts it, that could render a registered title defeasible. Even a failure to comply with s 15 of the SLC on extinguishment prior to alienation could not defeat a registered title so obtained. The apex court had so concluded, as could be seen in *TR Nyutan's* case that the remedy open to the aggrieved party lies in damages by way of compensation, under s 197 of the SLC. C D E
- [125] In this regard, considering the variation in the definition of the words 'subject to' as discussed above, we are of the considered opinion that the phrase 'Subject to this Code' in s 132(1) does not make the NCR as the qualifying factor to indefeasibility other than what is expressly stated therein — the 'fraud factor'. F
- [126] In coming to this conclusion, we considered the 2018 Amendments that introduce the concept of deferred indefeasibility of title for provisional lease — and not a lease proper — as the legislative response to the controversial issue of indefeasibility of title and the question of extinguishment of NCR resulting from the decision of the Federal Court in *TR Nyutan*. As highlighted by the Minister in charge of tabling the 2018 Amendments that: G H
- The recent Federal Court case of *TR Nyutan & Others v TH Holdings & Others* (2017) also had adverse implications on native customary rights to land in Sarawak. The issue in *TR Nyutan* case involved claim of Native Customary rights within an area over which a Provisional Lease had been issued to a private company. The court ruled that while claims of native customary rights are proven, the rightful claimants are only entitled to be paid compensation but could not claim back the land since the provisional lease was later registered as a lease in the Land Office, thereby conferring indefeasibility of title on the registered owner thereof. I
- To address the problem arising from *TR Nyutan* case, the proposed amendment also

- A** introduces the principle of deferred indefeasibility for any provisional lease issued under s 28 of Land Code. This amendment will further safeguard the interests of the natives over native customary rights land and rights over native territorial domain to ensure that land held under such rights of the natives would not be included in any area intended to be covered by a provisional lease.
- B** It is thus proposed that s 28 of the Land Code be amended, so that upon completion of a final survey of the land covered by a provisional lease, land held by native customary rights or within a native territorial domain must be excluded from the provisional lease. In other words, the provisional lease does not enjoy the statutory protection of the principle of indefeasibility of title under the Torrens Land System, until and unless:
- C**
- (a) a final survey of the land to be alienated has been completed; and
 - (b) all land held by natives under native customary rights by virtue of Section 5 of the Land Code and/or land under a native territorial domain have been excluded.
- D**
- E** [127] The 2018 Amendments therefore prohibit alienation of State land before a completion of a survey, which shall allow exclusion of NCR under s 5 or NTD under s 6A from the area covered by the provisional lease and denial of registration of a lease proper if the area is already held under NCR or NTD respectively. Consequently, anyone holding a provisional lease shall not be entitled to an indefeasibility of title under s 132 of the SLC.
- F** [128] On the question of extinguishment of NCR, we find that the SLC is clearly protective of NCR whereby alienation of State land or use for a public purpose are prohibited for land which is encumbered with NCR lawfully created under s 5 or land which has been issued with native communal title under s 6A until and unless all native customary rights have been surrendered or extinguished or provisions for compensating the persons entitled thereto have been made (s 15(1)).
- G**
- H** [129] Section 5(3) of the SLC too provides proper procedures for extinguishment of NCR created under the said provision whereby compensation shall be paid for: (i) the planting of land with fruit trees; and (ii) the occupation or cultivation of land; or by providing other land over which such rights may be exercised, with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.
- I** [130] Interestingly, the SLC also provides a presumption clause in respect of a claim for NCR over State land, whereby ‘whenever any dispute shall arise as to whether any native customary rights exist or subsist over any State land, it shall be presumed until the contrary is proved, that such State land is free of and not encumbered by any such rights (s 5(7)). As a corollary, before any question

of extinguishment arises there must be first proof of the lawful creation or the existence of NCR over the State land.

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[131] Reverting to the questions posed, we shall answer the questions as to whether an extinguishment exercise of native customary rights over land as provided under s 15 of the Sarawak Land Code is required prior to the alienation of lease of state land in the affirmative.

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[132] However, as to whether the lease of state land alienated without prior extinguishment of native customary rights is therefore null and void and/or the areas encumbered with native customary rights to be excised out or excluded from the lease of state land, the answer is not straightforward, as we notice that this aspect is not provided for in s 15 of the SLC.

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[133] In such absence, we find it necessary to look at the entire SLC relating to the issues of extinguishment, indefeasibility of title and NCR in order to understand their relationships within the scheme of the Land Code as a whole, bearing in mind the 2018 Amendments that mandated the exclusion of NCR under s 5 or NTD under s 6A in provisional lease prior to its registration to a lease proper.

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[134] In this respect, there is a statutory obligation on the part of the authority to conduct a survey before alienation so as to avoid inclusion of NCR or NTD in the grant of a provisional lease and the lease proper.

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[135] After due deliberation of all the relevant provisions in the SLC, and having concluded that NCR is not a factor qualifying indefeasibility of title, any native who is deprived of his NCR by reason of alienation may find the remedy in s 197 of the SLC, which provides as follows:

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Any person who is deprived of any land or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

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[136] This is what the Federal Court had decided in *Husli* that ‘upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the government under s 197 of the Land Code accrued’.

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[137] Taking into consideration the legislative intervention in curing the effects of *TR Nyutan*, we do not find the need to depart therefrom, and as such

- A the question framed as to ‘whether the Federal Court should depart from the decision of *TR Nyutan*’ shall be answered in the negative.

The effects of the 2018 Amendments of the Sarawak Land Code — Retrospectivity or prospectivity

- B [138] The appellants argued that the 2018 Amendments apply retrospectively to solve problems arising from the Federal Court decision in *TR Sandah 1* and *TR Nyutan* — which is clearly stated in the Hansard. In any event, the appellants contended that these appeals are ongoing, and the Court of Appeal is not the final arbiter. Therefore, as the amendments are currently in full effect, the question of retrospective application of this new law is irrelevant and the Federal Court is bound to follow the statutory law as opposed to the ruling in earlier decisions which mischief is sought to be rectified by that amending law.
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- E [139] The respondents on the other hand argued that the 2018 Amendments ought to operate prospectively from the date of its taking into effect on 1 August 2019 because it is trite law that an Act or Ordinance that affects substantive rights of the parties should not be retrospective, and the SLC is one such legislation. As such, the court is to apply the law as it exists at the time of hearing and not after. It was further argued that even if the amendment has retrospective effect (which is denied), it only affects provisional lease and not a lease proper.

- F *Judicial ruling versus statutory law — Retrospective versus prospective effects*

- G [140] It would be appropriate at this juncture to highlight this aspect of retrospective and prospective effect of an amending law — in judicial ruling and in statute, because this is what the crux of the matter in the present appeals is about — the extent of the application of the Federal Court’s ruling in *TR Sandah 1* and *TR Nyutan* vis a vis the 2018 Amendments to SLC.

- H [141] It is trite legal principle that a legislative change in a statute is not intended to have a retrospective effect ‘unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction ...’ (*Ireka Engineering & Construction Sdn Bhd v PWC Corp Sdn Bhd and other appeals* [2020] 1 MLJ 311).

- I [142] In fact, there is, at common law, a general rule ‘that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events (Sir Owen Dixon CJ in *Maxwell v*

Murphy (1957) 96 CLR 261).

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[143] There is however a stark difference between the effects of a judicial ruling and that of a statute in respect of their retrospectivity and prospectivity, which we found as clearly articulated in the words of Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095 (HL) when his Lordship compared the retrospective effects of a judicial ruling as opposed to the prospective effect of a statute, such that:

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Bearing these matters in mind, the law which the judge then states to be applicable to the case before him is the law which, as so developed, is perceived by him as applying not only to the case before him, but to all other comparable cases, as a congruent part of the body of the law. Moreover, when he states the applicable principles of law, the judge is declaring these as constituting the law relevant to his decision. Subject to consideration by appellate tribunals, and (within limits) by judges of equal jurisdiction, what he states to be the law will, generally speaking, be applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred.

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It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, *when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect*. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred sometime, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is to be applied equally to all and yet be capable of organic change.

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... I recognise, of course, that the situation may be different where the law is subject to legislative change. *That is because legislation takes effect from the moment when it becomes law, and is only retrospective in its effect to the extent that this is provided for in the legislative instrument*. Moreover, even where it is retrospective, it has the effect that as from the date of the legislation a new legal provision will apply retrospectively in place of that previously applicable.

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[144] There is however a limitation in the retrospectivity of a judicial ruling as described by Lord Nicholls in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] UKHL 41 (HL) who observed that:

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[26] ... The retrospective nature of a court ruling on a point of law means that the ruling applies in all cases, past as well as future. This is subject only to defences of general application, such as limitation, laches, and res judicata.

- A [145] And so also, when a judgment clearly states that its ruling ‘only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims (*Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 (FC)).
- B [146] Otherwise, ‘the law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded (*Cadder v Her Majesty’s Advocate* (2010) 30 BHRC 257 per Lord Hope) and to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined (*Cadder v Her Majesty’s Advocate* per Lord Rodger). That is the common law position’
- C (*Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alameloo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 (FC)).
- D [147] Abdul Malek Ahmad FCJ in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 when referring to the principle enunciated in *Public Prosecutor v Dato’ Yap Peng* [1987] 2 MLJ 311 held that
- E ‘... To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level’.
- F *How the 2018 Amendments impact the appeals*
- G [148] Having stated the law on the retrospectivity and prospectivity of a judicial ruling and a statute, we now examine the 2018 Amendments to the SLC, in finding the nature and extent of the amendments in respect of the issues on: (i) *Pemakai Menoa* and *Pulau Galau*; and (ii) deferred indefeasibility of provisional lease; and (iii) how they affect the present appeals.
- H [149] One of the utmost important aspects in statutory interpretation is to give effect to the legislative purpose in the 2018 Amendments that was designed to suppress the mischief and advance the remedy resulting from the decision in *TR Sandah 1* and *TR Nyutan*. This mischief rule which derives its origin in *Heydon’s Case* (1584) 76 ER 637 — is a classic illustration of the role of legislative purpose as a tool of statutory interpretation which is widely cited and reprinted in statutory interpretation casebooks.
- I [150] According to *Heydon*:
- And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) fourthings are to be discerned and considered: — 1st. What was the common law

- before the making of the Act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th. The truereason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro private commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. A B
- [151] As to what extent the 2018 Amendments have on *TR Sandah 1* and *TR Nyutan*, the answer can be found in the Federal Court decision in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1. In *Alma Nudo*, the Federal Court had the opportunity to examine three Indian cases (*ST Sadiq v State of Kerala* [2015] 4 SCO 400; *Indira Nehru Gandhi v Shri Raj Narain* 1975 2 SCC 159; and *Medical Council of India v The State of Kerala* Writ Petition (C) No 178 & 231 of 2018 (unreported), SC on the effect of the legislative intervention vis a vis a judicial decision wherein it was concluded that the power of the Legislature to amend a law which formed the basis of the decision of the court is recognised. It held that: C D
- [84] Read in context, the three cases above do not stand for the proposition that any amendment to a law which has been interpreted by a court is an impermissible encroachment into judicial power. *On the contrary, the cases clearly recognise the power of the Legislature to amend a law which formed the basis of the decision of the court. The effect of such an amendment is not to overrule the decision of the court in that case, but to alter the legal foundation on which the judgment is founded. The earlier decision of the court then becomes unenforceable for the interpretation of the newly amended law. But the decision itself which led to the amendment is not affected.* E F
- [85] In fact, there are plethora of decisions by the Indian Supreme Court postulating a principle to the effect that while a Legislature does not have the power to render ineffective a judgment of a court, it may amend the law to alter the legal basis upon which the judgment was founded (see for instance *Janapada Sabha Chhindwara v The Central Provinces Syndicate Ltd* [1970] 1 SCC 509 at para 10; *State of Haryana v Karnal Co-Op Farmers's Society Ltd* [1993] 2 SCC 363 at para 37, *SR Bhagwat v State of Mysore* [1995] 6 SCC 16 at para 18). The same principle was succinctly elucidated by the Indian Supreme Court in the case of *Cauvery Water Disputes Tribunal* [1993] Supp 1 SCC 96 (II) at para 76): G H
- The principle which emerges from these authorities is that the Legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the Legislatur amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.* I
- [86] The distinction between amending a law to remove its defects and overruling a decision of the court was explained in *Cheviti Venkanna Yadav v State of Telangana* [2017] 1 SCC 283:

- A This plenary power to bring the statute in conformity with the legislative intent and correct the flaw pointed out by the court can have a curative and neutralizing effect. *When such a correction is made, the purpose behind the same is not to overrule the decision of the court or encroach upon the judicial turf, but simply enact a fresh law with retrospective effect to alter the foundation and meaning of the legislation*
- B *and to remove the base on which the judgment is founded.* This does not amount to statutory overruling by the Legislatur. *In this manner, the earlier decision of the court becomes non-existent and unenforceable for interpretation of the new legislation.*
- C [152] And so, we are bound to adopt the current regime of the statutory law — the SLC — not only to cases which are yet to be filed with the courts, but also ‘to all pending cases and all those cases still under appeals within our court system’ (*Ling Peek Hoe & Anor v Ding Siew Ching and another appeal* [2017] 5 MLJ 385 (‘Ling Peek Hoe’)).
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- E [153] The mischief of the ruling on *Pemakai Menoa* and *Pulau Galau* in *TR Sandah 1* is what the 2018 Amendments sought to suppress; and to advance a remedy in the form of s 6A. It was a deliberate choice by the Sarawak State Legislatur to give statutory force of law to the customs of *Pemakai Menoa* and *Pulau Galau* in what is termed as Native Territorial Domain — a communal usufructuary rights having title in perpetuity. The key aspects of s 6A are stated at para [71] above of this judgment. In the State assembly when tabling the bill to affect the 2018 Amendments, it was said:
- F The Judgment of the apex Court of this country has a profound impact on the rights of the natives which, in accordance with their customs, is their land. Leaving the Judgment as it stands is not an option.
- ...
- G Tuan Speaker, after the *Director of Forests Sarawak & Anor v TR Sandah Tabau & Others* case whereby the Federal Court ruled that the native customs of *Pemakai Menua Pulau Galau* has no force of law. We have two options to respond to the Federal court ruling. One, was to allow the controversy to be resolved in court. Second, consider a political solution. At that time, Allahyarham Pehin Sri Haji Adenan Satem ... (Applause) ... was determined and committed to respond through
- H the option two, to go for possible political solution. Therefore, he has directed us to pursue option two and find a possible political solution to resolve the issue involving ... sorry Tuan Speaker ... *Pemakai Menua* and *Pulau Galau* as reflected in the case of the *Director of Forests and TR Sandah* case.
- I [154] Perhaps, it must be emphasised that these appeals were based on a claim under s 5 of the SLC — because s 6A was not in existence yet when these appeals were heard at the courts below. And the ruling in *TR Sandah 1* on *Pemakai Menoa* and *Pulau Galau* as not having a force of law, was based on the interpretation of s 5 of the SLC. And in seeking to address this issue, the State

Legislature deliberately chose to recognise these customs as having the force of law, and that they be regulated in the scheme of s 6A, independently of s 5 of the SLC.

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[155] With this background, we hold that as at 1 August 2019, s 6A of the SLC shall be the governing provision on NTD — or what is commonly referred to as *Pemakai Menoa* and *Pulau Galau* for the Iban community; and from that same date onwards, the ruling in *TR Sandah 1* that *Pemakai Menoa* and *Pulau Galau* has no force of law, is no longer a valid authority; and the court is duty bound to give effect to the statutory law, as contained under s 6A.

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[156] Having said that however, applying s 6A in the context of the present appeals is not without its peculiar challenges — because s 6A, while recognising *Pemakai Menoa* and *Pulau Galau*, provides for the procedures to be followed in making such claims — to the Superintendent in such form as may be provided by the Director, to be filled in with all relevant evidence; and the Director shall be the approving authority — and the appeal therefrom goes to the Minister. The role of the court in respect of s 6A is not expressly provided for.

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[157] That having been said, considering that these appeals which were commenced under s 5 of the SLC and proceeded throughout until they reached us when the amendments have already been in force, we must, given the peculiar circumstances of these appeals, apply s 6A, in particular sub-s (6) of the SLC which reads:

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(6) Any claim for a native territorial domain shall not be made or allowed in respect of any area or land where, before the coming into force of this section, there is a final decision by a court of competent jurisdiction that no usufructuary rights have subsisted or have been lost or abandoned by members of the native community making that claim.

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[158] As was alluded to earlier at paras [74]–[77] above, the main effect of this provision is to prevent a claim to be made for an area or land where there is already a final NCR decision by the final court before the coming into force of this section. The clearest example is the case of *TR Sandah 1* and *TR Nyutan* — that claims over the land, premised on the practices of *Pemakai Menoa* and *Pulau Galau* in these two cases which were finally decided by the Federal Court then are not to be made or allowed. After the 2018 Amendments, the very premise upon which the majority rested their findings would no longer be available. That majority decision in *TR Sandah 1* case held sway as a binding precedent for cases having the same issues, only until 31 July 2019. *Post* that date, the 2018 Amendments would step in to rule the roost, so to speak.

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[159] As regards these appeals, we hold that the decisions of the Court of Appeal as not final, because final ‘could only mean those cases that have already

A exhausted their appeal process within the court system' (*Ling Peek Hoe*).

[160] Hence, in order to do justice to these cases which are caught by the peculiar circumstance of the legislative overruling of *TR Sandah 1* and the statutory recognition of *Pemakai Menoa* and *Pulau Galau* in s 6A, we find basis in subsection 6 thereof, to make the following orders:

Case A

C	D	Case No	Appellant	Respondent
		01(f)-31-10 of 2019(Q)	1. Busing ak Jalil 2. Lai ak Jali 3. Nanggai ak Liyom 4. Burai ak Enseriban 5. Bunyie ak Guha 6. Bunta ak Mamut 7. Marsar ak Aping	1. Kerajaan Negeri Sarawak 2. Jabatan Tanah dan Survei Cawangan Mukah
E	F	02(f)-77-10 of 2019(Q)	1. Busing ak Jalil 2. Lai ak Jali 3. Nanggai ak Liyom 4. Burai ak Enseriban 5. Bunyie ak Guha 6. Bunta ak Mamut 7. Marsar ak Aping	Empire Plantation Sdn Bhd

[161] Considering the communal nature of *Pemakai Menoa* and *Pulau Galau* in s 6A, we are of the view that an individual claim, as opposed to communal claim, cannot be sustained. The appeal in respect of Case A ought to be and is hereby dismissed.

Case B

H	I	Case No	Appellant	Respondent
		01(f)-32-10 of 2019 (Q)	1. Nikodemus ak Singgai 2. Gubil ak Padat 3. Sangat ak Lasa (a representative action)	1. Superintendent of Lands and Surveys Samarahan Division 2. Director of Forest, Sarawak 3. Kerajaan Negeri Sarawak

[162] Upon our due perusal of the grounds of judgment of the Court of Appeal, we found that there was no assessment made on the finding of facts, such that the severance of 300 hectares of *Temuda* from the claimed 8001

hectares was based on *TR Sandah 1*. As stated earlier, the Court of Appeal was right then to make such an order based on the then prevailing ruling of *TR Sandah 1*.

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[163] However, with the coming into force of s 6A, we are of the view that this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where *Pemakai Menoa* and *Pulau Galau* are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of *Pemakai Menoa* and *Pulau Galau* accordingly as allowed under s 6A. Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties.

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[164] Undoubtedly, the Federal Court can and is legally entitled to make such assessment, however, by doing so, the parties are deprived of an avenue to appeal further on the matter of assessment.

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[165] In respect of the size and boundary of *Pemakai Menoa* and *Pulau Galau*, we find that the limits of 500 hectares or 1,000 hectares respectively were discussed at the Special Task Force level with consultation of *Majlis Adat Istiadat Sarawak* and upon further deliberation at the State Legislative assembly, as attested by the following records:

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... These Task Force and Committee met numerous times and engaged with various stakeholders over the past year to come up with a comprehensive solution.

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At the same time, *Majlis Adat Istiadat Sarawak* (MAIS) was tasked to consult and obtain the views of the different native communities on their respective concepts, customs, cultural practices and *Adats* on native territorial domain.

These consultations culminated into a special conference for Native Communities' Leaders held on 24th and 25th January 2018 in Kuching. The conference's resolutions and recommendations were forwarded to the State Government, which later formed one of the basis to amend certain provisions of the Land Code and which are now proposed to be incorporated in this amendment.

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Tuan Speaker, the most challenging issue before the Task Force is to recommend the size of native territorial domain. After lengthy discussions s 6A(2) stipulated that any area claimed as native territorial domain shall not exceed five hundred hectares (500ha) or one thousand two hundred and fifty acres (1250 acres).

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[166] However, upon further debate and discussion at the State Legislative Assembly, the size of the area which may be claimed for *Pemakai Menoa* and *Pulau Galau* can reach up to a maximum of 1,000 hectares.

- A** Tuan Speaker, 22 Honorable Members have expressed among them are the Honorable Member for Engkilili, Murum, Kedup, Batu Danau, Tasik Biru, Layar, Machang, Meluan, Sama Laju, Katibas, Bukit Bungan, Ngemah, Krian, Tupong, Bukit Goram, Daro, Krian, Pelagus, Telang Usang, Lingga, Kalaka, Piasau all raised the issue and expressed their concern that the limit of 500 hectares the native community may claim as Native Territorial Domain under Section 6 may not be fair and just as some community requirement and need may exceed this threshold. They have suggested and proposed to the limit be increased to 1000 hectares.

- B** Tuan Speaker, the Government has taken note to this suggestion and proposal as you all were aware, as all Honorable Members are aware, a Motion to amend the Bill to increase the area and the manner of proposing a Motion has been circulated to the Honorable Members of this House.

Case C

	Case No	Appellant	Respondent
D	01(i)-33-10 of 2019 (Q)	1. Ramba ak Bungkong	1. Unus bin Tambi
		2. Mujing ak Louis	2. Superintendent of Lands and Surveys, Miri Division
E		3. Johnny ak Louis Nanta	3. State Government of Sarawak
		4. Jarin ak Leng	
		5. Aning ak Simon	
		6. Dickson ak Jalang	
F	02(i)-79-10 of 2019 (Q)	1. Ramba ak Bungkong	Asco Green Sdn Bhd
		2. Mujing ak Louis	
		3. Johnny ak Louis Nanta	
G		4. Jarin ak Leng	
		5. Aning ak Simon	
		6. Dickson ak Jalang	

- H** [167] This case was disposed of summarily. While this is proper in so far as the company is concerned because of the indefeasibility of title held by them and in the absence of any allegation of fraud; a finding of fact as to whether there was NCR in the form of *Pemakai Menoa* and *Pulau Galau* over the land must be based on a full trial of the matter as against the third party, because, if it is proved that their NCR existed as a matter of established fact, the appellants are entitled to be compensated with damages under s 197 of the SLC.

I [168] It is on this basis that we find that the summary disposal of the claim by the appellants against the third party was improper merely based on the affidavit evidence. Evidence needs to be led viva voce subject to due

cross-examination by adverse parties. And for this reason, this case is reverted to the High Court to be fully heard as between the appellants and the third party specifically on the question of whether there was NCR created or existed on the alienated land which entitled the appellants for compensation.

Case D

Case No	Appellant	Respondent
02(f)-76-10 of 2019	1. Yahya bin Timbon 2. Mahari bin Lamat 3. Haslan bin Abu Bakar	Kumpulan Parabena Sdn Bhd

[169] Upon perusal of both the judgments of the High Court and the Court of Appeal, we are satisfied based on the proper appreciation of the evidence presented, the concurrent findings had been that there was no NCR created nor existed over the land concerned. We find no reason to disturb such findings by both the courts below. The decisions of the High Court and the Court of Appeal are hereby affirmed, and this appeal is therefore dismissed.

CONCLUSION

[170] Premised upon the factual matrix obtaining in each of the appeals before this court, the decisions of the Court of Appeal panels following the decisions of the *TR Sandah 1* would have been impeccable had it not been for the 2018 Amendments to the SLC. Those amendments that gave statutory recognition to the customary practices of *Pemakai Menoa* and *Pulau Galau* as having the force of law had rendered the ruling in *TR Sandah 1* entirely tenuous and untenable. Though the amendments preserved apex court decisions, such saving was limited to the cut off effective date of 1st August 2019. Post that date, all pending cases involving NCR claims for *Pemakai Menoa* and *Pulau Galau* must be subject to the provisions of the 2018 Amendments. It is clear to us that the present appeals involving the same issue must be decided accordingly to give effect to the clear dictates of the 2018 Amendments to the SLC.

[171] The customary rights of *Pemakai Menoa* and *Pulau Galau* are statutory communal rights governed independently under s 6A of the SLC where there will be issuance of native communal title in perpetuity, free of any premium, rent or other charges, in the name of a person or body of persons in trust for the native community named therein.

[172] The NCR under ss 5 and 6A are statutorily protected from alienation. They are to be excluded from provisional lease or a lease proper. Its extinguishment shall only be made according to the proper procedure in the SLC.

- A [173] The Torrens System is the underlying premise or foundation of the SLC which places importance on registration of title and the concept of indefeasibility. Any deprivation of an established right to land by virtue of indefeasibility shall warrant a claim against the State for compensation — such that the alienation and issue of lease without first ascertaining the existence of
- B NCR of the claimants, damages by way of compensation under s 197 of the SLC would be the remedy, if indeed such rights existed in favour the claimants.

- [174] In the upshot, we make the orders in relation to each of the appeals accordingly, as per above. As to costs, each party to bear own costs.
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- [175] Mention date for Case B between *Nikodemus & Ors v Superintendent of Lands and Surveys Samarahan Division & Ors* in Civil Appeal No 01(f)-32–10 of 2019 (Q) at the Court of Appeal; and Case C between *Ramba Ak Bungkong & Ors v Unus bin Tambi & Ors* in Civil Appeal No 01 (i)-33–10 of 2019 (Q) at the High Court at Miri is fixed within 14 days from today.
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Order accordingly.

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- Reported by Dzulqarnain Ab Fatar

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